No. 90-1484-CFX
Status: GRANTED

Title: United States, Petitioner
v.
Fred Stanton Smith, et al.

Docketed:
March 21, 1991

Court: United States Court of Appeals
for the Eleventh Circuit

Vide:
90-1361

Counsel for petitioner: Solicitor General

Counsel for respondent: Lyons,Dennis G., Seigel,Stuart E., Salter,Vance E., Stettin,Herbert, Vicevich,Barbara E., Davidson,Barry R.

See also:
90-1361
90-1551

40 printed copies of pet NOTE: See appd 90-1361

Entry	Date	Note	Proceedings and Orders
1	Mar 21 1991	G	Petition for writ of certiorari filed.
2	Apr 3 1991		Brief of respondents Fred Smith, et al. in opposition filed.
3	Apr 17 1991		Brief of respondent Fred Stanton Smith in opposition filed. VIDED.
5	Apr 19 1991		Order extending time to file response to petition until April 30, 1991.
6	Apr 22 1991		Brief of respondent Shutts & Bowen in opposition filed.
7	Apr 30 1991	X	Brief of respondent The Bank of New York in opposition filed. VIDED.
8	Apr 30 1991		DISTRIBUTED. May 16, 1991
9	May 7 1991	X	Reply brief of petitioner United States filed. VIDED.
10	May 20 1991		REDISTRIBUTED. May 23, 1991
11	May 28 1991		Petition GRANTED.
			**
13	Jul 3 1991		Order extending time to file brief of petitioner on the merits until July 29, 1991.
14	Jul 26 1991		Brief of petitioners Holywell Corporation, et al. filed. VIDED.
15	Jul 29 1991		Brief amici curiae of California, et al. filed. VIDED.
16	Jul 29 1991		Brief of petitioner United States filed. VIDED.
17	Aug 1 1991		Order further extending time to file brief of respondent on the merits until September 16, 1991.
18	Aug 9 1991	D	Motion of the Solicitor General for divided argument filed.
19	Aug 12 1991	D	Motion of respondents for divided argument filed.
20	Aug 20 1991		Record filed.
		*	Received certified record from USCA 11.
25	Sep 13 1991		Brief of respondent Shutts & Bowen filed. VIDED.
21	Sep 16 1991		Brief of respondent Fred Stanton Smith filed. VIDED.
22	Sep 16 1991		Brief of respondent The Bank of New York filed. VIDED.
23	Sep 20 1991		Motion of the Solicitor General for divided argument DENIED.
24	Sep 20 1991		Motion of respondents for divided argument DENIED.
26	Oct 11 1991		CIRCULATED.
27	Oct 15 1991		SET FOR ARGUMENT WEDNESDAY, DECEMBER 4, 1991. (2ND CASE)
29	Oct 16 1991	X	Reply brief of petitioner United States filed. VIDED.
28	Oct 17 1991	X	Reply brief of petitioners Holywell Corporation, et al. filed. VIDED.

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No. 90-1484-CFX

Entry	Date	Note	Proceedings and Orders
30	Dec 4 1991		ARGUED.

(1)

No. 90-1484

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

FRED STANTON SMITH, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the trustee of a liquidating trust, appointed by the bankruptcy court to receive and dispose of the debtors' assets pursuant to a Chapter 11 plan of reorganization, is required to file federal income tax returns on behalf of the debtors and pay the taxes due.

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In the Supreme Court of the United States

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No.

UNITED STATES OF AMERICA, PETITIONER

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FRED STANTON SMITH, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (90-1361 Pet. App. 1a-16a)[1] is reported at 911 F.2d 1539. The opinion of the district court (Pet. App. 17a-27a) is

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[1] A petition for a writ of certiorari (No. 90-1361) in this same case was filed on February 28, 1991, by the debtors in the underlying bankruptcy proceeding. References to "Pet. App." in this petition are to the Appendix to that petition.

The parties to the proceedings in the court of appeals, in addition to the United States, were Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates, Theodore B. Gould (collectively, the debtors), Fred Stanton Smith (the trustee) and Bank of New York (the bank).

unreported. The opinion of the bankruptcy court (Pet. App. 28a-37a) is reported at 85 Bankr. 898.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1990. A petition for rehearing was denied on December 21, 1990 (Pet. App. 40a-41a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 6012(b) of the Internal Revenue Code, as amended, provides in pertinent part:

A. Section 6012(b)(3):

In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

B. Section 6012(b)(4):

Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

2. Section 6151(a) of the Internal Revenue Code, as amended, provides:

Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

STATEMENT

1. Miami Center Limited Partnership obtained a construction loan from the Bank of New York (the bank) for the development of the Miami Center, a commercial real estate project in downtown Miami. Following default on this loan, the Miami Center Limited Partnership and the related Holywell Corporation, Chopin Associates, Miami Center Corporation, and Theodore B. Gould (the debtors) filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Florida. The cases were consolidated. Pet. App. 2a. On October 22, 1984, the bankruptcy court authorized the consummation of a pre-petition contract to sell parcels of real property in Washington, D.C. (the Washington properties), owned by Holywell Corporation. These sales were concluded in December 1984 and January 1985, generating proceeds of approximately $32 million. Pet. App. 29a; *Holywell Corp.* v. *Bank of New York*, 59 Bankr. 340, 345 (S.D. Fla. 1986).

2. The debtors and the bank thereafter submitted competing plans of reorganization to the bankruptcy court. On August 8, 1985, the bankruptcy court confirmed an amended version of the bank's plan, over the debtors' objections. The district court affirmed the confirmation order. See *Holywell Corp.* v. *Bank*

of New York, 59 Bankr. at 353. The Eleventh Circuit subsequently dismissed, as moot, the debtors' appeal of the confirmation order because the plan had been substantially consummated and no effective relief could be fashioned. See *Miami Center Ltd. Partnership* v. *Bank of New York*, 838 F.2d 1547, 1557 cert. denied, 488 U.S. 823 (1988).[2] Pet. App. 2a-3a.

The plan, which was effective October 10, 1985, called for the transfer of essentially all of the debtors' assets (including the Miami Center and the proceeds from the sale of the Washington properties) to a liquidating trust.[3] See Pet. App. 42a-43a.

> Article V of the Plan vests the liquidating trustee with all right, title and interest of the debtors in their estate property and empowers the trustee to administer the liquidation of that property pursuant to the Plan. The Plan authorizes the liquidating trustee not only to liquidate the debtors' property but also to manage the property "in all other ways as would be lawful for any person owning the same to deal therewith. * * * "

Pet. App. 14a.

Under the plan, the trustee of the liquidating trust was directed to enter into a contract with the bank for sale of the Miami Center. A sale price of $255.6

[2] The government filed no objection to the confirmation of the plan and did not participate in the appeals of the confirmation order. Pet. App. 18a-19a.

[3] Article V of the plan provides that "[a] Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court * * * is designated as Trustee of all property of the estates of the Debtors." Pet. App. 43a.

million was established, consisting of approximately $16 million in cash and the cancellation of $240 million of debt owed by the debtors to the bank. The net proceeds of the sale were to be paid into the liquidation trust, along with the proceeds from the sale of the Washington properties, for eventual distribution to creditors. Pet. App. 3a, 19a.

3. Although the gain on the sale of the Washington properties was realized during the fiscal year ending July 31, 1985, the corporate debtors did not file tax returns reporting the pre-confirmation sale income until January 4, 1988. At that time, the debtors requested the trustee (who then held the sale proceeds, along with the debtors' other assets) to pay the taxes owed. Pet. App. 19a.

Neither the corporate debtors nor the trustee filed federal income tax returns for any fiscal year ending after July 31, 1985. They thus never reported the gains realized from the sale of the Miami Center property. Nor did either the debtors or the trustee report the interest income derived by the trustee from reinvestment of the sales proceeds. Pet. App. 3a-4a. The taxes owed on the realized gains (in excess of $75 million) from the sales of property, and on the interest income (in excess of $8 million) earned on the proceeds of those sales, were thus neither reported nor paid by the debtors or the trustee. See 90-1361 Pet. 6 n.5.

4. Instead, on December 27, 1987, the trustee of the liquidating trust filed an adversary proceeding in the bankruptcy court seeking a declaration that the trustee was not obligated to file federal income tax returns or pay income tax on the gains realized from the sales of the Washington and Miami Center properties or the interest income received on the proceeds

of those sales.[4] Pet. App. 4a. The government contended that the trustee was required to file income tax returns on behalf of the debtors and to pay the tax due, pursuant to Sections 6012(b)(3) and (b)(4) and 6151(a) of the Internal Revenue Code (26 U.S.C.). Under Section 6012(b)(3), "a trustee in a case under title 11 of the United States Code," or "[an] assignee," having possession of or title to substantially all of the property of a corporate debtor, is required to file tax returns on behalf of the debtor. With respect to individual debtors, Section 6012 (b)(4) similarly provides that the returns of a "trust" or an "estate of an individual under chapter 7 or 11 of title 11 of the United States Code" shall be filed by the "fiduciary thereof." Section 6151(a) then further provides that the person required to make such a return of tax "shall pay such tax."

The bankruptcy court held, however, that the trustee was not responsible for filing federal income tax returns on behalf of the debtors and therefore was not responsible for paying the federal income taxes due. The court held that the liquidating trustee was not a "trustee in a case under title 11" within the meaning of Section 6012(b)(3), but rather "a creature of a contract, * * * a contract trustee." Pet. App. 32a. The court further held that the trustee was neither an "assignee" under Section 6012(b)(3), nor a "fiduciary" under Section 6012(b)(4), reasoning that the trustee's duties and powers were limited to the disposition of the debtors' assets and were thus analogous to those of a "disbursing agent." Pet. App.

[4] No determination of the tax liability of any party had then been made by the IRS with respect to such gains and investment income, although the taxes would evidently be substantial.

32a-33a. The court concluded that the debtors, and not the trustee, were responsible for the reporting and payment of any taxes due on the realized gains and interest income, notwithstanding that all of the assets from which such payment could be made had been transferred from the debtors to the trust. Pet. App. 31a-34a. The district court adopted the reasoning of the bankruptcy court and affirmed its ruling. Pet. App. 17a-27a.

5. In a split decision, the Eleventh Circuit affirmed. The court of appeals held that "[b]y its terms" (Pet. App. 11a), Section 6012(b)(3)—which requires a "trustee in a case under title 11 of the United States Code" to file returns—"refers only to trustees who are appointed under chapter 11 of the Bankruptcy Code." Pet. App. 11a. The majority concluded that the liquidating trustee, who had been appointed by the bankruptcy court in this case, was not a trustee in a case under Title 11, "but rather a contract trustee performing limited and essentially ministerial duties." *Ibid.* The majority further concluded that "the liquidating trustee's nondiscretionary duties of distributing the trust property in accordance with the Plan makes him similar to a disbursing agent rather than an assignee or fiduciary." Pet. App. 11a-12a. The majority suggested that its "conclusion does not leave the government without the ability to collect taxes on the post-confirmation sale of property. It simply means that the reorganized debtor, not the liquidating trustee is responsible for such taxes." Pet. App. 9a-10a.

In dissent, Judge Cox noted that the majority had misread the plain words of the applicable statute. Section 6012(b)(3) applies to all trustees "in a case under Title 11 of the United States Code" and not simply to trustees "appointed under Chapter 11."

Pet. App. 13a. The majority's effort to distinguish a "contract trustee" appointed by the bankruptcy court (Pet. App. 11a) from a "trustee in a case under title 11" simply "fails to comport with the broad wording of the statute." Pet. App. 13a. It also is inconsistent with the legislative history of the statute, which reveals a congressional intent "to reach a broad spectrum of persons acting in a fiduciary capacity for a corporation in a bankruptcy." Pet. App. 14a (citing H.R. Rep. No. 1337, 83d Cong., 2d Sess. A396 (1954) and S. Rep. No. 1622, 83d Cong., 2d Sess. 563 (1954). Judge Cox concluded that:

> [S]ection 6012(b)(3) anticipates any situation where substantially all of the assets of a corporation are vested in a person acting in a fiduciary capacity for the bankrupt corporation. Accordingly, the liquidating trustee, not the assetless corporate debtors, should be responsible for discharging tax obligations.

Pet. App. 14a.

REASONS FOR GRANTING THE PETITION

The decision in this case threatens to create a tax loophole of troubling proportions. It would allow a liquidating trustee to be appointed in a case under Title 11, take title to the debtor's assets, invest or dispose of those assets in a manner that realizes taxable income, but neither report nor pay the taxes owed on that income. In reaching this result, the court of appeals ignored the plain language and evident purpose of the statutory provisions that have been enacted by Congress specifically to ensure that such a loophole would *not* exist. By establishing the hitherto unheard-of category of "contract trustee," and making such "contract trustee" exempt from the

tax reporting and payment obligations of all other trustees, fiduciaries and assignees in cases under Title 11, the decision of the court of appeals conflicts with the decisions of other circuits.

1. Statutes that are designed to "protect[] the public revenues" from evasion through corporate reorganization or insolvency should "be liberally construed to achieve this broad purpose." *United States v. Key*, 397 U.S. 322, 324 (1970). See also *Bramwell v. United States Fidelity & Guaranty Co.*, 269 U.S. 483, 487 (1926). Congress has long manifested its intent that income accruing to the debtor's estate in bankruptcy is not to escape taxation.

Section 6012(b)(3), which evolved from the Revenue Act of 1916, ch. 463, § 13(c), 39 Stat. 756 (*Northwest Utils. Sec. Corp.* v. *Helvering*, 67 F.2d 619, 621 (8th Cir. 1933), cert. denied, 291 U.S. 684 (1934); *Louisville Property Co.* v. *Commissioner*, 140 F.2d 547 (6th Cir.), certs. denied, 322 U.S. 754 and 755 (1944)), requires a "receiver, trustee in a case under title 11 of the United States Code, or assignee," who obtains possession or holds title to "all or substantially all the property * * * of a corporation" to file the income tax return for that corporation.[5] The statute emphasizes the breadth of its com-

[5] Similarly, Section 6012(b)(4), which applies to the estates of individuals, provides that the "[r]eturns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of Title 11 of the United States Code shall be made by the fiduciary thereof." The liquidating trustee in an individual bankruptcy is a "fiduciary" within the scope of this statute and must file a tax return and pay taxes on income realized in the liquidation. *In re Joplin*, 882 F.2d 1507, 1510 (10th Cir. 1989). Under Section 1398 of the Internal Revenue Code, a separate taxable entity, the estate of the individual debtor, came into existence when Mr. Gould filed for bankruptcy. The situation is different for the corporate debtors. Under

mand by stressing that the "receiver," "trustee," or "assignee" has this obligation whether he comes into possession of the corporation's assets "by order of a court * * *, by operation of law *or otherwise*." 26 U.S.C. 6012(b)(3) (emphasis added). Section 6051(a) then further requires that the taxes due on the return be paid by the person who filed the return. In this manner, Congress has ensured that the duty to report and pay taxes will follow the assets from which the income is realized and from which the tax payment is to be made.

In accordance with Congress's broad objective to ensure the reporting and payment of taxes on income earned on corporate assets held in others' hands, courts have applied Section 6012(b)(3) and its predecessors to "the assignee of corporate property, engaged in its orderly liquidation" (*Louisville Property Co.* v. *Commissioner*, 140 F.2d at 547), to the sales of real estate by a "trustee (of a corporation) in dissolution for the benefit of creditors" (*United States* v. *Loo*, 248 F.2d 765, 768 (9th Cir. 1957), cert. denied, 356 U.S. 928 (1958)), to sales of real estate by a trustee in a bankruptcy "liquidation" of the corporation (*United States* v. *Sampsell*, 266 F.2d 631, 633 (9th Cir. 1959)), and to the realization of gains from the sale of corporate assets and the receipt of "passive income from interest" by a "non-operating trustee" in a bankruptcy liquidation (*In re Sapphire S.S. Lines*, 762 F.2d 13, 14-15 (2d Cir. 1985), accord *In re Bentley*, 916 F.2d 431, 432 (8th Cir. 1990)). Affording the statute a construction consistent with

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Section 1399 of the Internal Revenue Code, no new taxable entity arose by virtue of their filing bankruptcy petitions, and the return to be made by the trustee under Section 6012(b)(3) is "for such corporation." 26 U.S.C. 6012(b)(3).

its comprehensive text and evident purpose, the Third Circuit held that a trustee appointed by the court to liquidate an estate in bankruptcy was subject to the tax reporting and payment obligations of Sections 6012(b)(3) and 6051(a):

> [W]e think that a fair reading of the pertinent sections of the Internal Revenue Code renders the non-operating trustee of a bankrupt corporation liable for the payment of taxes on the bankrupt's income, provided the trustee has possession of, or title to, substantially all the bankrupt's property.

In re I.J. Knight Realty Corp., 501 F.2d 62, 66 (3d Cir. 1974).

The legislative history and derivation of Section 6012(b)(3) support the conclusion that the statute should be applied as broadly as its language indicates. The predecessor of Section 6012(b)(3), Section 13(c) of the Revenue Act of 1916, ch. 463, 39 Stat. 771, provided, in pertinent part, that "receivers, trustees in bankruptcy, or assignees * * * operating the property or business of corporations * * * shall make returns * * * for such corporations." Treasury Regulations promulgated in 1918 under the first reenactment of this provision (Revenue Act of 1918, ch. 18, § 239, 40 Stat. 1081) construed the phrase "receivers, trustees in bankruptcy, and assignees" to include "trustees in dissolution." Treas. Reg. 45, Art. 622 (1918 Revenue Act). The decisions uniformly supported this interpretation. See, *e.g.*, *Northwest Utils. Sec. Corp.* v. *Helvering*, 67 F.2d 619, 620 (8th Cir. 1933), cert. denied, 291 U.S. 684 (1934); *Hellebush* v. *Commissioner*, 65 F.2d 902 (6th Cir. 1933). In enacting the 1954 Code, Congress confirmed that the phrase "receiver, trustee in

bankruptcy, or assignee" was intended to include any "fiduciary" acting on behalf of a corporation. See H.R. Rep. No. 1337, 83d Cong., 2d Sess. A396 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 563 (1954).[6]

2. The decision of the court of appeals in this case creates an artificial category, described as "contract trustees," which the court exempts from the tax reporting and payment obligations of Sections 6012(b) and 6051(a). There is no precedent for such a category; indeed, the term "contract trustee" appears not to have been used before in any context in any decision ever issued by a federal court.[7] Moreover, as the facts of this case demonstrate, an exemption afforded to a "contract trustee" creates the very evil that the statute is designed to avoid.

a. On the effective date of the reorganization plan, essentially all of the debtors' assets passed to the liquidating trustee who had been appointed by the bankruptcy court. These assets included the proceeds of the pre-confirmation sale of the Washington properties and the Miami properties which, shortly thereafter, were sold by the liquidating trustee at a sub-

[6] The Bankruptcy Tax Act of 1980, Pub. L. No. 96-589, § 6(i), 94 Stat. 3389, modified the language of the statute by substituting the words "trustee in a case under title 11 of the United States Code" for "trustee in bankruptcy." The legislative history makes clear that the change was intended only to "substitute references to bankruptcy cases under new title 11 of the U.S. Code for references to bankruptcy proceedings under the now-repealed Bankruptcy Act." S. Rep. No. 1035, 96th Cong., 2d Sess. 52-53 (1980).

[7] This statement is based upon a computer word search for the term "contract trustee" through the entire body of reported federal decisions.

stantial gain.[8] The court of appeals ruled that the liquidating trustee, who holds the proceeds of these sales and the interest income derived from the investment of those proceeds, is not required to report that income or to pay any tax that might be due. Instead, the court has assigned those responsibilities to the debtors, who, because of the transfer of their assets to the liquidating trustee, evidently lack funds to satisfy the tax liabilities resulting from the income received by the trustee.[9]

This shifting of the tax burden to the insolvent debtor for the income realized by the trustee would, as a practical matter, allow the taxes to escape payment. See Pet. App. 16a (Cox, J., dissenting). The comprehensively worded and broadly intended mission of Section 6012(b)(3)—to capture and tax income received into the hands of the "receiver," "trustee"

[8] The Washington properties were sold before the liquidating trustee was appointed. But the returns of the corporate debtors for the taxable year during which the Washington properties were sold (ending July 31, 1985) were not due until October 15, 1985. 26 U.S.C. 6072(b). On October 10, 1985, the trustee was vested with the corporate assets unreduced by the tax liabilities required to be accounted for on the 1985 returns. The return filing obligations of the trustee thus extend to the 1985 taxable year (including the Washington property sale) as well as later years. See *Nicholas* v. *United States*, 384 U.S. 678, 692-693 (1966).

[9] By contrast, in *In re Bentley*, 916 F.2d 431 (8th Cir. 1990), the court of appeals specifically rejected the suggestion that the insolvent debtor, rather than his liquidating trustee, should be responsible for taxes on gains realized and interest income received by the trustee. *Id.* at 432. In reaching this conclusion, the court noted that (*id.* at 433):

> a contrary holding would have the effect of burdening the debtor's fresh start under the bankruptcy law.

See also *Grozen* v. *Gardner*, 111 S. Ct. 654, 659 (1991).

or "assignee" who holds "substantially all of the assets" of the corporation—would thus quite plainly be defeated.

b. The rationale of the court of appeals is that the liquidating trustee appointed by the bankruptcy court in this case was neither "a trustee in a case under title 11," an "assignee" nor a "fiduciary," but was instead a "contract trustee" or "disbursing agent." Pet. App. 11a-12a. In so holding, the court of appeals drew arbitrary and unsupported distinctions that are inconsistent with the plain meaning of the words of the statute and its legislative purpose.

(i) The court of appeals' holding that the trustee is "not a trustee in a case under title 11" cannot be reconciled with the broad language of the statute. The liquidating trust was created pursuant to a plan confirmed under Title 11 (11 U.S.C. 1129); the trustee was then appointed by a court that drew its jurisdiction from Title 11 (11 U.S.C. 105); and jurisdiction existed in the bankruptcy court to resolve this adversary proceeding solely under Title 11 (11 U.S.C. 505(a)).[10] Given that Title 11 is the sole source of authority for the bankruptcy court to direct the disposition of the property of the debtors in this case, it is difficult to comprehend how the liquidating trustee appointed by the bankruptcy court could be anything other than a "trustee in a case under title 11." [11]

[10] 28 U.S.C. 2201(a), which prohibits declaratory judgments "with respect to Federal taxes," contains an exception for "a proceeding under Section 505 * * * of Title 11." *Ibid.*

[11] Indeed, at other points in this proceeding, the trustee has asserted that he is "a trustee acting in a case under title 11" within the meaning of an exception to the insolvency provisions of 31 U.S.C. 3713. See 3 C.A. App., Doc. 21, at 35. Section 3713(a)(1) gives first priority to claims of the United States if a person is insolvent. Section 3713(a)(2), invoked by the trustee, provides an exception to this rule for "a case under title 11." 31 U.S.C. 3713(a)(2).

The court of appeals apparently was of the view that the phrase "trustee in a case under title 11 of the United States Code," refers only to trustees appointed under a single section of the Bankruptcy Code (11 U.S.C. 1104(a)) which deals with trustees appointed in a Chapter 11 reorganization. See Pet. App. 11a. By its terms, however, Section 6012(b)(3) refers not to any single bankruptcy provision, but instead generically to all trustees appointed "in a case under title 11." The latter phrase necessarily encompasses the liquidating trustee in this case, whose authority derives from that of the bankruptcy court "in a case under title 11."

The court of appeals attempted to justify its exemption for "contract trustees" on the theory that the liquidating trustee was appointed to perform "limited and essentially ministerial duties" (Pet. App. 11a). This characterization is without legal significance and is, in any event, incorrect. The duties of the liquidating trustee include the responsibility to hold, sell and invest assets, receive the income from those assets, enter into contracts, incur and pay expenses, and, ultimately, to make distributions in accordance with the confirmed plan. See Pet. App. 42a-46a. As Judge Cox stated in dissent, to describe these duties as "ministerial"

> denies the reality of [the trustee's] rights, duties and obligations under the Plan. A mere label does not magically transform the liquidating trustee into something he is not. In fact, his job description squarely fits within the Internal Revenue Code description of a "fiduciary."

Pet. App. 14a-15a. See also *In re I.J. Knight Realty Corp.*, 501 F.2d at 66 (applying Section 6012(b)(3) to a liquidating trustee). Accord, *In re Bentley*, 916 F.2d at 431-432.

(ii) The liquidating trustee also functioned as an "assignee" or "receiver" within the meaning of Section 6012(b)(3). An assignee is "one to whom an assignment is made," or "one to whom a right of property is legally transferred." *Webster's Third New International Dictionary* 132 (1986). The term "receiver" has been defined as "embracing any person acting as an agent or depository of funds for the court." *Spring Valley Water Co.* v. *San Francisco*, 246 U.S. 391, 395 (1918). Both of these terms accurately describe the liquidating trustee in this case, who was vested with all right, title, and interest of the debtors in their property and who was empowered to administer the liquidation of that property pursuant to the reorganization plan. Internal revenue regulations have long provided that the return filing requirement applies to receivers "engaged in * * * marshaling, selling, and disposing of [a corporation's] assets for purposes of liquidation." Treas. Reg. 118, § 39.52.2 (1939 Code). See also *Pinkerton* v. *United States*, 170 F.2d 846, 847-848 (7th Cir. 1948) (applying statute to "liquidating receiver"); Treas. Reg. § 1.6012-3(b)(4) (applying statute to a "trustee in dissolution"). As this Court stated in a similar context in *Spring Valley Water Co.* v. *San Francisco*, 246 U.S. at 395, "[t]o give the word ["receiver"] the narrower meaning contended for would defeat the obvious and adjudged purpose of the statute." [12]

[12] We do not intend to suggest that the liquidating trustee was appointed as a "receiver." See 11 U.S.C. 105(b) (bankruptcy court is not to appoint receivers). Our point is that the scope of Section 6012(b)(3) is sufficiently broad that the term "receiver" in that statute encompasses the function performed by the liquidating trustee in this case.

(iii) Also erroneous is the court of appeals' holding (Pet. 12a) that the trustee was not a "fiduciary" of the estate of an individual debtor within the meaning of Section 6012(b)(4), which requires that the "[r]eturns of * * * an estate of an individual debtor under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof." The court of appeals reasoned that the trustee was not a "fiduciary" because his duty to identify and pay allowed claims in accordance with the terms of the plan was akin to that of a "disbursing agent." [13] Pet. App. 12a. A "disbursing agent," however, could not be said to have the power, granted to the liquidating trustee in this case, to sell, encumber or invest property and to deal with property "in all * * * ways as would be lawful for any person owning the same to deal therewith." Pet. App. 45a-46a. The term "fiduciary" is defined broadly in Section 7701(a)(6) of

[13] The sole decision relied on by the court of appeals for this proposition was *In re Alan Wood Steel Corp.*, 7 Bankr. 697 (E.D. Pa. 1980). In *Alan Wood*, a disbursing agent was appointed to hold specific funds under the plan of reorganization in escrow until certain doubtful claims were resolved, and then to make distribution accordingly. *Id.* at 699-701. The district court held that Section 6012(b)(3) was not applicable in that case because "a disbursing agent does not have possession of or hold title to substantially all the business or property of the debtor corporation." 7 Bankr. at 701. In the present case, by contrast, the liquidating trustee was appointed trustee of "all property of the estates of the debtors" under the Bankruptcy Code. Pet. App. 43a. The trustee in this case was also given substantial powers to manage, encumber and dispose of all such property. Pet. App. 43a-46a.

the Internal Revenue Code as a "guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity." [14] This definition encompasses the liquidating trustee who was appointed, and given broad powers, by the bankruptcy court in this case. See *In re Joplin*, 882 F.2d at 1510 (liquidating trustee is a "fiduciary" required to report taxes under Section 6012(b)(4)).

3. The decision in this case conflicts with the decisions of other courts of appeals. Other courts have applied the tax reporting and payment provisions of Sections 6012(b) and 6051(a) not only to liquidating trustees in bankruptcy cases (*In re Joplin*, 882 F.2d at 1510; *In re I.J. Knight Realty Corp.*, 501 F.2d at 66; *United States* v. *Sampsell*, 266 F. 2d at 633), but also to other fiduciaries travelling under a variety of titles. Assignees for benefit of creditors, trustees in dissolution, receivers, liquidating trustees—whose common characteristic is that they possess the property of a taxpayer for purposes of liquidation and distribution—have all been held to come within the broad sweep of Section 6012(b) or its predecessors. They have thus all been held responsible for filing returns and paying taxes on the taxpayer's behalf. See *Hersloff* v. *United States*, 310 F.2d 947 (Ct. Cl. 1962), cert. denied, 373 U.S. 923 (1963); *United States* v. *Loo*, 248 F.2d at 768; *Louisville Property Co.* v. *Commissioner*, 140 F.2d at 547; *Kavanagh* v. *First Nat'l Bank*, 139 F.2d 309 (6th Cir. 1943); *First Nat'l Bank* v. *United States*, 86 F.2d 938

[14] See also Treas. Reg. § 301.7701-6 (26 C.F.R.) ("A fiduciary is a person who holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest, or receives and controls income of another, as in the case of receivers.").

(10th Cir. 1936); *Northwest Utils. Sec. Corp.* v. *Helvering*, 67 F.2d at 621. In this manner, the courts have ensured that the underlying purpose of these statutes has been achieved, and that tax obligations have been borne and fulfilled by the fiduciary who possesses the assets that generated the income.

The court of appeals in this case departed from these uniform and long-standing decisions by affording controlling significance to a label designated as "contract trustee." This novel term, which has no history in the law, does not even accurately denote the source of the trustee's authority, which is derived wholly from court order. Aside from pointing out that Congress (quite understandably) did not specifically list "contract trustees" among the persons who are responsible for filing returns under Section 6012(b) (Pet. App. 11a), the court did not explain why a liquidating trustee appointed in a case under Title 11 should be treated differently from any other trustee, receiver, assignee or fiduciary liquidating the property of a corporate or individual taxpayer.

4. The use of liquidating trusts and similar devices as a means for reorganizing a debtor's estate within Chapter 11 of the Bankruptcy Code has become increasingly popular in recent years. See Anderson & Wright, *Liquidating Plans of Reorganization*, 56 Am. Bankr. L.J. 29 (1982). If the decision in this case is allowed to stand, the popularity of such liquidating trusts can be expected to surge beyond all expectations: by immunizing such entities from federal income tax liability for capital gains and investment income, the ruling in this case would enable creditors to receive the windfall of a distribution of the debtor's assets swollen by unpaid tax funds. Such distortion of the proper uses of the Bankruptcy Code

would result in losses to the public fisc of substantial proportions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 90-1484

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA,
Petitioner,

v.

FRED STANTON SMITH, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF RESPONDENTS HOLYWELL, ET AL., IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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April 1991

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BRIEF OF RESPONDENTS HOLYWELL, ET AL., IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondents Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Theodore B. Gould (the "Holywell respondents"),[1] by their undersigned counsel, respectfully submit this brief in support of the Solicitor General's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

We fully support the Solicitor General's petition.

---

[1] Respondent Miami Center Corporation has no subsidiaries; its parent is respondent Holywell Corporation, which has no parent corporations or subsidiaries other than wholly owned subsidiaries. None of the other Holywell respondents is a corporation. *See* S. Ct. R. 29.1.

We have also petitioned for a writ of certiorari to review the judgment of the court of appeals in this case. Petition for a Writ of Certiorari, *Holywell Corp.* v. *Smith*, No. 90-1361 (filed February 28, 1991).

As we explained in that petition, the court of appeals' decision (which occasioned a vigorous and cogent dissent) presents a pernicious misapplication of a matrix of federal statutes designed to insure that federal taxes are paid by the fiduciaries of insolvent business entities. By holding that the trustee in this case is exempt from those statutes, the court of appeals has created a tax loophole available in a broad spectrum of cases. Our petition and that of the Solicitor General demonstrate the grave error committed by the court of appeals. Its decision is contrary to the plain language of the statutes, to the purposes of the tax and bankruptcy laws, and to the decisions of this Court and those of every other circuit to address this question.

Respectfully submitted,

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April 1991

Nos. 90-1361, 90-1484

In The

Supreme Court of the United States

October Term, 1990

IN RE HOLYWELL CORPORATION, THEODORE B. GOULD, MIAMI CENTER CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP AND CHOPIN ASSOCIATES,

Debtors.

HOLYWELL CORPORATION, THEODORE B. GOULD, MIAMI CENTER CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, and CHOPIN ASSOCIATES, and THE UNITED STATES OF AMERICA,

Petitioners,

vs.

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, and THE BANK OF NEW YORK,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI FILED BY THE DEBTORS AND THE UNITED STATES OF AMERICA

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QUESTION PRESENTED

Whether a trustee appointed post-confirmation to a creditors' trust is responsible for filing federal tax returns and paying federal income taxes on gain realized from the sale of the Debtors' real property where the confirmed and substantially consummated plan of reorganization which created the trust does not provide for the payment of these taxes, the government did not object to the plan or appeal the confirmation order, and the Internal Revenue Code contains no requirement that such a trustee is responsible for these taxes?

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OPINIONS BELOW

The opinions relevant to the Petitions for Writs of Certiorari are the September 18, 1990 decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Smith (In re Holywell Corp.)*, 911 F.2d 1539 (11th Cir. 1990), App. A at 1a;[1] the July 31, 1989 Memorandum Opinion of the United States District Court for the Southern District of Florida, *United States v. Smith (In re Holywell Corp.)*, No. 88-0795 slip op. (S.D. Fla. July 31, 1989), App. B at 17a; and the April 28, 1988 Final Judgment and separate Findings of Fact and Conclusions of Law of the United States Bankruptcy Court for the Southern District of Florida, *Smith v. United States (In re Holywell Corp.)*, 85 Bankr. 898 (Bankr. S.D. Fla. 1988), App. C at 28a and App. D at 38a, respectively.

STATEMENT OF JURISDICTION

The Petitioners seek review of the decision of the Eleventh Circuit Court of Appeals affirming decisions of the bankruptcy court and the district court which held that the Miami Center Liquidating Trust is not responsible for filing tax returns or paying the Debtors' income taxes, if any, on gain realized from the sale of realty, the proceeds of which were used to fund a creditors' plan in a bankruptcy reorganization. The Petitioners have failed to establish any jurisdictional basis for granting the writ. They have demonstrated neither the existence of a conflict between the decision of the United States Courts of Appeals for the Eleventh Circuit and any decision of this Court or other Courts of Appeals, nor an important question of federal law which has not been, but should be settled by this Court. *See* Sup.Ct.R. 10.1(a)-(c). The Court also lacks jurisdiction because the issue is moot. Accordingly, the Petitions for Writs of Certiorari should be denied.

[1] References to the Petitioner-Debtors' appendix will be by the symbol "App. ___." References to the appendix attached hereto will be by the symbol "Liquidating Trustee's App. ___."

STATEMENT OF THE CASE

Introduction

The Petitioners are five related Debtors[2] who filed simultaneous voluntary Chapter 11 petitions nearly six years ago in the United States Bankruptcy Court for the Southern District of Florida, and the United States of America (hereinafter "government"). This is the Debtors' eighth attempt at review in this Court. Each previous attempt was unsuccessful,[3] as was their attempt to obtain a stay of the Eleventh Circuit's mandate in this case.[4]

The Petitioners seek review of the Eleventh Circuit's affirmance of a bankruptcy court order which determined that the Miami Center Liquidating Trust is not responsible for filing tax returns or paying income taxes, if any, on gain realized from the sale of realty used to fund a bankruptcy plan of reorganization because the confirmed, substantially consummated plan does not provide for payment of any such taxes and because the trust itself is not a taxable entity. The Petitioners' statement of the case selectively focuses only on part of the lower court's decision, overlooking those findings and conclusions which preclude review by this Court. The Petitioners' respective statements of the case are therefore incomplete and require elaboration.

In August 1985, the bankruptcy court confirmed a plan of reorganization proposed by the Bank of New York (hereinafter "bank").[5] Its central features were:

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[2] The Petitioner-Debtors are Theodore B. Gould and four entities he either owns or entirely controls – Holywell Corporation, Miami Center Corporation, Miami Center Limited Partnership and Chopin Associates.

[3] Case numbers 87-1988, 87-1989, 88-80, 89-864, 89-708, 89-917 and 90-676.

[4] On January 22, 1991, Justice Kennedy denied the Debtors' application for a stay of the mandate and to reinstate an order enjoining disbursements by the trust.

[5] The Debtors' creditors overwhelmingly approved the bank's plan over one proposed by the Debtors. *Miami Center Limited Partnership v.*

(Continued on following page)

(a) substantive consolidation of the bankruptcy estates of the five Debtors;

(b) creation of the Miami Center Liquidating Trust, consisting of all of the Debtors' assets, as defined by 11 U.S.C. Section 541(a), including the Miami Center and the proceeds from the sale of the Washington properties;

(c) appointment of a trustee of the Miami Center Liquidating Trust (hereinafter "Liquidating Trustee");

(d) the purchase of the Miami Center by the bank for $255.6 million, to be paid by cancellation of the Debtors' obligations to the bank (some $242 million), plus payment in cash of $13.6 million; and

(e) the bank's release of approximately $30 million in cash collateral, representing proceeds from the pre-confirmation sale of the Washington properties, to the Liquidating Trust for payment of allowed claims.

The plan, as Petitioners acknowledge, did not provide for the payment of income taxes.[6] (Debtors' Petition for Writ of Certiorari at 5). The Debtors' appeal of the bankruptcy court's August 8, 1985 confirmation of the plan was unsuccessful. *Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), *dismissed as moot sub nom, Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988). The government was a creditor for other tax claims; it received notice of the proceedings, never objected to the

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(Continued from previous page)

Bank of New York, 838 F.2d 1547, 1548 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988). Like the bank's plan, the Debtors' reorganization proposal provided for sale of the Miami Center property and did not provide for payment of federal income taxes on gain realized from the sale. App. C at 29-30a.

[6] One of the Debtors' arguments in the appeal of the confirmation order on the merits was that the plan should not have been confirmed because it did not provide for the payment of federal taxes.

disclosure statement or the plan, voiced no objection to confirmation, did not vote against the plan, and did not appeal the order of confirmation. App. C at 30a.

Course of Proceedings

The Liquidating Trustee filed an adversary complaint in the bankruptcy court against the government, the bank, and the Debtors, seeking a declaratory decree of the question of whether the Miami Center Liquidating Trust was obligated to file a tax return on behalf of the Debtors and to pay federal income taxes due, if any, on gain realized from the sale of what is known as the Washington properties and the Miami Center. The Liquidating Trustee also sought alternative relief against the bank in the event the trust was obligated to report and pay federal income taxes on the grounds that the bank indemnified the trust and the bank, as the proponent of the plan, was responsible for providing the means necessary for consummation of the plan. Liquidating Trustee's App. A at 1a.

The bankruptcy court entered judgment determining the Trust had no such tax obligations, App. C at 28a, and, accordingly, did not reach the claim against the bank or any issue of priority concerning payment of tax claims.

The government and the Debtors appealed to the district court and obtained a stay which precluded the trust from paying any of its creditors.[7] Liquidating Trustee's App. B at 8a. The district court thereafter affirmed the bankruptcy court's decision and vacated the stay. App. B at 17a.

The government and the Debtors next appealed to the Court of Appeals for the Eleventh Circuit and obtained a continuation of the stay from that court, which again prevented the trust from disbursing assets to pay its remaining

[7] At the time the stay was entered, the Liquidating Trustee had already paid millions of dollars to hundreds of creditors, pursuant to the confirmed plan, without objection from the government. Some prepetition creditors and a number of trust administrative creditors remained to be paid while the stay was in effect.

creditors. Liquidating Trustee's App. C at 10a. The Circuit Court of Appeals thereafter affirmed the decision of the district court, App. A at 1a, and denied the Debtors' motion for stay of the mandate, as did this Court, acting through Justice Kennedy. Liquidating Trustee's App. D at 12a and E at 15a. The government sought neither rehearing in the Eleventh Circuit nor a stay of the mandate from either the Eleventh Circuit or this Court.

Statement of the Facts

After filing their Chapter 11 petitions in August 1984, the Debtors sought and received authority to consummate prepetition contracts for the sale of what is referred to as the Washington properties. App. C at 29a. In accordance with a bankruptcy court order, the sales closed and the Debtors deposited the proceeds in controlled accounts subject to the further order of the bankruptcy court. The bankruptcy court thereafter determined those proceeds were subject to the bank's lien as cash collateral. Neither the government nor the Debtors appealed this order. The government never filed a proof of claim or a request for payment, and never sought resolution of whether and to what extent taxes were due as a result of the sale of the Washington properties.

Shortly thereafter, the Debtors and the bank submitted competing plans of reorganization. In the respective disclosure statements, each included the use of the proceeds from the sale of the Washington properties as part of the plan and each provided for the sale of the Miami Center, but neither provided for the payment of federal income taxes due, if any, on gain realized from the sale of those properties. App. C at 29-30a. The government received copies of the competing plans and disclosure statements. App. A at 2a. The bank's plan was confirmed and substantially consummated. *Miami Center*, 838 F.2d at 1552. Each of the three courts that has reviewed the tax issue has emphasized the government's total failure to protect its own interest; the fact that the government allowed creditors to vote for the bank's plan relying on the monies available for payment without regard to the payment

of income taxes; and the government's failure to appeal the order of confirmation of a plan which made no provision for the payment of taxes on gain from the sale of the Washington and Miami properties. In addition, the Petitioners have overlooked the conclusion by all three courts that this belated challenge of the failure of the plan to provide for payment of income taxes is now entirely moot because the plan has been substantially consummated and cannot be undone. App. A at 6-7a; B at 20-21a; C at 36-37a.

The Debtors (but not the government) objected to the bank's plan of reorganization in part because it failed to provide for the payment of taxes on the sale of the Debtors' realty, but their appeal of the confirmation order was entirely unsuccessful. At the trial of the adversary proceeding which led to these Petitions for Writs of Certiorari, the Debtors introduced as evidence the bankruptcy court's pre-confirmation statement to them about alleged tax consequences of the proposed plan:

> The last point I want to touch on are the tax consequences. In this area I readily concede that I am a babe in the woods and haven't the foggiest notion of what the tax consequences would be on the particular decision that we are talking about right at the moment. **If a modification of this plan or any other adjustment can be made to alleviate adverse tax consequences for the debtors, then I think that a request for such a modification ought to be respected and honored and I would, so long as I have the discretion to do so, intend to accomplish that result and I don't mean to foreclose it today.** I think all of us have recognized in our discussion this morning that there might be tax consequences, we are not certain if we have considered all that we could do to alleviate the adverse tax consequences, and if somebody will bring them to our attention, through you, I imagine Mr. Kent [Debtors' counsel] we would want to reconsider that, but on the basic question of whether or not I should doom the bank's plan in its present form by just saying that there is no legal predicate here and

> no justification for me to allow the version of consolidation that is embodied in that plan, I am not willing to take that step today and I am willing to go along with the approach the bank has offered.

Liquidating Trustee's App. F at 17-18a (emphasis supplied). No such modification was ever requested to take potential tax liability into account. There never was evidence adduced of the amount of the tax liability which might result, despite the bankruptcy court's express invitation to the Debtors to do so. The bankruptcy and district courts both approved confirmation of that plan, and millions of dollars were paid to hundreds of creditors without the government once raising the issue of tax consequences.

The present effort to hold the Liquidating Trustee personally liable for the payment of these taxes is sought even though neither the Debtors nor the government ever sought such relief in the bankruptcy court in the form of a counterclaim to the original adversary proceeding for declaratory relief, or by any other proceeding before the appeals from the April 28, 1988 order. (Debtors' Petition for Writ of Certiorari at 11).[8] Indeed, the government never filed a proof of claim for the income taxes in question, never filed an administrative request for payment, never sought a jeopardy assessment or determination of the taxes now claimed to be due, and never sought appellate review of the order confirming the plan of reorganization.

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[8] The Debtors have repeatedly tried to hold the Liquidating Trustee responsible for the taxes. *See Gould v. Smith*, No. 88-6187 slip op. (11th Cir. July 7, 1989); *Twin Development Corp. v. Smith*, No. 87-0037 slip op. (W.D. Va. Nov. 15, 1988); *Holywell Corp. v. Smith*, No. 87-5195 slip op. (11th Cir. March 18, 1988). Presently pending in the Eleventh Circuit, case no. 90-5831, is a consolidated appeal by the Debtors and a number of their wholly-owned subsidiary companies in which they again seek, *inter alia*, to require the Liquidating Trustee to establish reserves for payment of the taxes at issue. In a number of these proceedings, the Debtors (and in this petition the government, as well) assert that the Trustee is personally liable for failure to pay the taxes in question.

The government's conclusion that the "taxes would evidently be substantial" (Petition for Writ of Certiorari at 6, n.4) and the Debtors' conclusions as to the amount of taxes due (Petition for Writ of Certiorari at 6, n.5) are wholly speculative and without any record support. There was no evidence of the amount of taxes claimed to be owed introduced as evidence at the trial. These conclusions are *dehors* the record and should be stricken. *See Harmelin v. Michigan*, 59 U.S.L.W. 3324 (October 30, 1990) (Order striking references to facts that, while relevant, were outside the record, and requiring party to revise and reprint its brief).

The confirmed plan fixes the Liquidating Trustee's responsibilities. App. A at 3a. He is only authorized to pay allowed claims and required to return all remaining funds to the Debtors. He has no discretion under the plan as to the identity, amount or priority of creditors. He is not authorized to do anything more than carry out the plan provisions. In addition, he lacks the plenary avoidance powers of a Title 11 bankruptcy trustee provided under Bankruptcy Code Sections 544, 547, 548 and 554. App. F at 42a.

The Petitions for Writs of Certiorari focus almost entirely on the Eleventh Circuit's determination that the trust is not a taxable entity under the Internal Revenue Code. In fact, the Eleventh Circuit's opinion is far broader than that; it determined the plan does not permit payment of the taxes in question, and any attempt to modify the confirmed plan in order to require such payment must fail because the plan has been substantially consummated and no meaningful relief is available at this late date. In other words, the Eleventh Circuit held the issue is now moot. App. A at 6-7a. The Eleventh Circuit also held that the government's claim is not an administrative first priority claim as defined by the plan. App. A at 8-9a. And of course, the opinion also held that the Liquidating Trustee is not a trustee under Title 11, and therefore has no tax obligations under the Internal Revenue Code, App. A at 10-12a.

The Eleventh Circuit's conclusion that the doctrine of mootness precluded the relief sought was central to its opinion. App. A at 6-7a. That court affirmed the bankruptcy

court's holding that to require the trust to file tax returns and pay the Debtors' federal income taxes:

> would require the complete dismantling of the substantially consummated plan, more than two and one-half years after its confirmation. A modification would require the liquidating trustee to recover millions of dollars already paid to creditors for redistribution on a pro rata basis. Additionally, the creditors voted on the plan and received payments under the terms of the plan based upon good faith reliance induced, in part, by the inaction of the government. It is simply impracticable, and may well nigh be impossible, to unwind the substantially consummated and confirmed plan.

App. C at 36-37a.

The Eleventh Circuit denied the Debtors' suggestion of rehearing *in banc* without a single member of the court voting for rehearing, including the judge who dissented from the panel decision. App. E at 41a. The government did not seek rehearing. The Eleventh Circuit and this Court denied the Debtors' motions to stay the mandate. Liquidating Trustee's App. D at 12a and E at 15a. In addition to not seeking rehearing, the government chose not to seek a stay of the mandate after the Eleventh Circuit's decision was rendered.

SUMMARY OF ARGUMENT

The Petitions for Writs of Certiorari should be denied because there is no legally cognizable basis for granting the writ. The Debtors and the government have attempted to create conflicts in the law where none exist. In addition, the claim that this case presents an important question of federal law concerning the obligation of the Liquidating Trustee to file tax returns and pay income taxes ignores repeated findings that the government is the victim of its own inaction. This case is not precedent for the use of a liquidating trust to avoid tax. All that is necessary to avoid such a result is that the government, the Debtor or any interested party raise the issue of tax responsibility in a timely fashion. Once a plan has been confirmed and is substantially consummated, it is too

late to modify it to require such payment. For all of these reasons, the Petitions for Writs of Certiorari should be denied.

ARGUMENT

I.

REASONS WHY THE COURT SHOULD DENY THE WRIT

The Petitioners have not met any of the recognized standards governing review by certiorari as set forth in Supreme Court Rule 10. These considerations, "while neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons that will be considered." Sup.Ct.R. 10.1. As there is neither a conflict between the Eleventh Circuit's decision and decisions of this Court or other Courts of Appeals, nor an important question of federal law which has not been, but should be settled by this Court, the Petitioners have failed to demonstrate any of the established criteria and the petitions should be denied. *See* Sup.Ct.R. 10.1(a)-(c).

A.

There Is No Conflict In The Law

The Petitioners' attempt to establish that the Eleventh Circuit's opinion conflicts with decisions of this Court fails, for the cases cited as evidence of the alleged conflict are wholly inapplicable.

As their first reason why the writ should be granted, the Petitioner-Debtors cite *Nicholas v. United States*, 384 U.S. 678, 692-94 (1966) for the proposition that a trustee appointed by a bankruptcy court to liquidate a corporation is subject to penalties imposed by the Internal Revenue Service for failure to file tax returns. (Petition for Writ of Certiorari at 10). *Nicholas*, however, involved a bankruptcy trustee rather than a contract trustee appointed under a confirmed plan, and there was never an issue of his obligation to pay the taxes in question. *Nicholas*, 384 U.S. at 681, n.7. The question in that case was limited to the government's entitlement to post-petition interest on an acknowledged tax liability. This case involves a substantially consummated plan of reorganization

which created a liquidating trust and which does not provide for payment of taxes. Thus, *Nicholas* fails to demonstrate the existence of a conflict that would warrant granting the writ.

Equally unfounded is the Petitioners' reliance on *California State Board of Equalization v. Sierra Summit, Inc.*, ___ U.S. ___, 109 S.Ct. 2228, 2235 (1989) as a basis for conflict jurisdiction. The Debtor-Petitioners acknowledge that *Sierra Summit* applies 28 U.S.C. Section 960 to *bankruptcy trustees* (Debtors' Petition for Writ of Certiorari at 10), yet they have consistently asserted throughout the scores of appeals in these bankruptcy proceedings, including in their petition in this Court, that Respondent Smith is not a bankruptcy trustee appointed in accordance with Bankruptcy Code Section 1104. The Eleventh Circuit did not hold that Section 960 does not require bankruptcy trustees to file tax returns; the opinion simply determines that this Liquidating Trustee does not have to file a tax return on behalf of the Debtors because, *inter alia*, he is not a bankruptcy trustee. The Liquidating Trust is not subject to 28 U.S.C. Section 960.

In addition, Section 960 imposes a tax liability only where the officer or agent has been "conducting any business" of the debtor. Three courts have already determined that the Liquidating Trustee performed essentially ministerial functions and has not conducted any business of the Debtors. App. A at 3a n.2, 11-12a; B at 24a; C at 30a, 32-33a. A challenge to this finding is particularly inappropriate for certiorari review because it is essentially a disputed evidentiary matter already determined adversely to the Petitioners through three separate levels of review. *See Rogers v. Lodge*, 458 U.S. 613, 624 (1982); *Graver Tank & Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). Accordingly, neither 28 U.S.C. Section 960 nor *Sierra Summit* should serve as a basis for granting the writ of certiorari.

The Petitioner-Debtors next rely on 31 U.S.C. Section 3713 and *United States v. Key*, 397 U.S. 322, 324 (1970) as a basis for certiorari review, arguing that Section 3713 gives a priority to the government's purported tax claim. A close reading of the statute and *Key* reveals nothing that grants the government a first priority administrative tax claim under the circumstances of this case.

First, Section 3713(a)(2) is inapplicable because it provides that "[t]his subsection does not apply to a case under

Title 11." Second, *Key* involved the government's appeal of an order confirming a reorganization plan which provided for immediate payment of only part of the government's recognized tax claim, with the remainder to be paid over time. *Key*, 397 U.S. at 323. The issue before the Court in *Key* was whether the treatment of the government's tax claim under the plan was fair and equitable. In the case at bar, the plan made no provision for payment of the taxes in question. The plan was confirmed after notice to the government and without the government's objection or appeal. Now that the plan has been substantially carried out without payment of the taxes in question, it is simply too late to determine whether the plan should have included a provision for payment of the claimed taxes.

The Debtor-Petitioners also rely on *King v. United States*, 379 U.S. 329, 336-38 (1964) for the proposition that a disbursing agent is liable for payment of a government priority claim despite the failure of the plan to provide for its payment and despite the fact that "he performed 'only the ministerial function of paying out the deposited funds in conformity with the court's orders.' 379 U.S. at 338." (Petition for Writ of Certiorari at 11). The Petitioner-Debtors and the government further challenge the Eleventh Circuit's decision on the ground that Respondent Smith's powers exceed those of a mere disbursing agent, thus making him liable for the taxes.

King is hardly precedent under the facts of this case. Although the *King* plan did not provide for the government's contract claim, the debtor and the disbursing agent misrepresented to the bankruptcy court that even if it had to pay that claim, there would be enough money to do so. *King*, 379 U.S. at 331-32. Despite the government's timely claim, the disbursing agent paid other claims, leaving nothing with which to pay the government's claim. *King*, 379 U.S. at 332-33. The issue in *King* was whether the disbursing agent incurred personal liability for the government's contractual claim under these facts. *King*, 379 U.S. at 333. The answer was yes because he actively misled the court and the government. No claim of misrepresentation exists here.

King has a number of other substantial distinguishing facts. In that case, the government protected its interest by timely filing a claim. In this case, the government neither filed a claim of any kind nor brought a proceeding to enforce

its right to payment of the taxes in question. The Liquidating Trustee did not even exist at the time the plan was approved and certainly made no misrepresentations to the court concerning the availability of funds to pay the taxes, and there was no evidence that the Liquidating Trustee committed any impropriety in depleting trust assets in order to avoid payment to the government. In addition, in the instant case, neither the Debtors nor the government filed a counterclaim in the original adversary proceeding to hold Respondent Smith personally liable for the failure of the bank's disclosure statements to disclose the tax liability, or the failure of the plan to provide for payment of the taxes. Unlike the disbursing agent in *King*, Respondent Smith has no relationship with the Debtors or with the proponent of the plan except that of an independent trustee. The disbursing agent in *King* knew of the government's claim and took steps to evade it. It was the Debtor-Petitioners in this case who knew of a potential tax liability and ignored the bankruptcy court's suggestion to present evidence of the amount of the alleged taxes and to move to modify the plan prior to substantial consummation. Liquidating Trustee's App. F at 17-18a. *King* is entirely inapplicable to this case and cannot serve as grounds for conflict jurisdiction.

Under facts similar to the case at bar, a bankruptcy court in Illinois rejected a claim of liability under *King*. In *In re Childress*, 59 Bankr. 828 (Bankr. N.D. Ill. 1986), the debtor brought an adversary proceeding against a disbursing agent for breach of fiduciary duty for failure to pay federal income taxes on the gain earned from the post-confirmation sale of the debtor's realty. That plan provided for the payment of such taxes, but did not include the estimated tax liabilities in the disbursement portion of the plan. 59 Bankr. at 829 and 831. The disbursement agent made a 100% distribution to creditors following the sale of the debtor's realty pursuant to court order, but the order did not require the retention of any funds to pay the taxes. 59 Bankr. at 829. The debtor waited several years before seeking relief. The bankruptcy court held that the debtor's failure to seek relief promptly was a bar to recovery. 59 Bankr. at 830. The court also held that the post confirmation sale of the debtor's real property did not give the government a fourth priority tax claim under former Bankruptcy Act Section 64a(4) because the taxes were not

due and owing prior to bankruptcy, nor did the sale give the government an administrative claim as defined by the plan. 59 Bankr. at 830-31.

The *Childress* court noted that even if the government was a creditor under the plan, it could not participate in the distribution because it failed to file a timely proof of claim, its claim was not "allowed" by the court, and the claim was not scheduled by the debtor. 59 Bankr. at 831. The court held there was no liability under this Court's decision in *King* or under 31 U.S.C. Section 3713 because "there was no debt due the United States in the form of a priority claim at the time of the February, 1981 order of disbursement," and because the duty to inform the court of the tax problem "was more properly on the debtor or his attorney." 59 Bankr. at 831-32. *Childress* further held:

> As the concurring opinion notes in *King*, a disbursing agent's control and possession are limited to the deposit. The deposit made by the debtor is merely required to include a sufficient sum to pay all scheduled priority claims. If the deposit does not include an amount sufficient to take care of all scheduled priority claims, the arrangement may not be confirmed. 8 Collier on Bankruptcy paragraph 5.32[8] at 663 (14th ed. 1974). If an arrangement is nevertheless confirmed without a sufficient deposit to pay all scheduled priority claims, the disbursing agent should arguably not be required to bear the burden of the court's unauthorized act absent facts such as in *King*. *See King v. United States, supra*, 85 S.Ct. at 434.
>
> Under the Bankruptcy Act, a disbursing agent is charged with distribution to specified recipients and has no reason or duty to know of or ascertain unscheduled debts. The disbursing agent performs only the ministerial function of paying out the deposited funds in conformity with orders of court. 8 Collier on Bankruptcy paragraph 5.27[7] at 640 (14th ed. 1974). Thus, lacking knowledge from some other source, the disbursing agent would be beyond the reach of 31 U.S.C. Section 192 if the government "priority claim" is unscheduled and unpaid. *King v. United States, supra*, at 433. The present case is simply not one of a disbursing agent's payment out the deposit so as to defeat a scheduled government priority claim.

Childress, 59 Bankr. at 832.

In re I.J. Knight Realty Corp., 501 F.2d 62 (3d Cir. 1974), also relied on by the Petitioners, is clearly inapposite. The Petitioners each rely on *Knight* for the proposition that the Liquidating Trustee is responsible for the tax claim because he is a trustee under Title 11, pursuant to Internal Revenue Code Section 6012(b)(3). *Knight*, unlike the case at bar, involved a bankruptcy trustee appointed pursuant to 11 U.S.C. Section 1104. On its face, Section 6012(b)(3) applies to bankruptcy trustees. Each reviewing court has found, however, that Section 6012(b)(3) is inapplicable in this case because the Liquidating Trustee is not a bankruptcy trustee appointed under Title 11, but rather a contract trustee with essentially ministerial duties. Because *Knight* only applies to bankruptcy trustees, it does not stand as a basis for conflict jurisdiction.

The Petitioners further rely on *In re Bentley*, 916 F.2d 431 (8th Cir. 1990) for the view that the Eleventh Circuit's decision conflicts with the fresh start provision of bankruptcy law. This position is unfounded. *Bentley* involved a Chapter 7 bankruptcy trustee's attempt to evade federal income taxes on the liquidation sale of estate property by "abandoning" the property pursuant to Section 554 of the Bankruptcy Code. *Bentley*, 916 F.2d at 432. *Id.* Although the trustee had filed tax returns, he disclaimed any tax liability. *Id.*

Unlike this case, *Bentley* involved a Chapter 7 bankruptcy liquidation sale rather than a sale pursuant to a confirmed Chapter 11 plan which bound the parties. Moreover, the trustee in *Bentley* tried to avoid his tax obligation by abandoning the sale proceeds pursuant to 11 U.S.C. Section 554. Abandonment is not an issue here. The *Bentley* court only held the sale was a taxable event under those circumstances. 916 F.2d at 433. It is true the court opined in reaching its conclusion that, "We note that a contrary holding would have the effect of burdening the debtor's fresh start under bankruptcy law," *Id.*, but that logic hardly warrants

granting a writ in this case. Unlike that case, the substantially consummated plan herein did not provide for such taxes. The Debtors knew it but did not seek modification and the government knew it and also did nothing. The Debtors had the opportunity to raise this issue in their unsuccessful appeal of the confirmation order. The issue is thus moot.

For all of the foregoing reasons, the Petitioners have entirely failed to establish the existence of a conflict between the opinion below and any decision of this Court, or of decisions of other courts of appeal.

B.

There Is No Important Question Of Federal Law

The government argues that the Eleventh Circuit's decision creates a "loophole of troubling proportions" because it allows trustees to avoid tax responsibilities and will encourage efforts by others to do so. The Eleventh Circuit created no such "loophole". The decision in question determined the plan did not provide for payment of income taxes, and because the government did not object to or appeal the confirmation order and allowed the plan to become substantially consummated, the relief sought by the government is now moot. App. A at 6-7a. Regardless of the applicability of any particular section of the Internal Revenue Code to the Liquidating Trustee, it is clear that the government is the architect of its own dilemma. There is no reason to believe that if a proper claim is promptly asserted, or the issue is otherwise timely presented to a reorganization court, there will be no bar to the collection of taxes. All the government need do is properly assert its rights.

C.

The Eleventh Circuit's Decision Is Consistent With Existing Law

The Petitioners have overlooked more than half of the Eleventh Circuit's decision. That court did not, as the Petitioner-Debtors assert, do "violence" to the Internal Revenue Code, nor did it ignore well established bankruptcy law. In

fact, the court's opinion is consistent with the law enunciated by this Court and by courts of appeals.

1. The Relief Sought Is Moot

The Eleventh Circuit's application of the mootness doctrine is consistent with federal law. The doctrine "is premised upon considerations of finality . . . and the court's inability to rescind . . . and grant relief on appeal." *Miami Center*, 838 F.2d at 1558, *quoting In re Sewanee Land Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984). A court may dismiss an appeal based on its lack of power to rescind certain transactions. *See Markstein v. Massey Associates Ltd.*, 763 F.2d 1325 (11th Cir. 1985); *In re Roberts Farms, Inc.*, 652 F.2d 798 (9th Cir. 1981); *Miami Center*, 838 F.2d at 1547. At the time of the decision in question, this Court had already refused to consider the Debtors' various post-confirmation challenges to the application of the mootness doctrine to the substantially consummated plan of reorganization.[9] This Court should refuse to consider this latest challenge, as well.

In addition, because the relief sought by the Petitioners would amount to a post-confirmation, post-substantial consummation modification of the plan, no change should be permitted. It would conflict with well established bankruptcy law forbidding such action. *See* 11 U.S.C. Section 1127(b); *In re Seminole Park & Fairgrounds, Inc.*, 505 F.2d 1011, 1014 (5th Cir. 1974); *Claybrook Drilling Co. v. Divanco, Inc.*, 336 F.2d 697, 701 (10th Cir. 1964); *In re Northampton Corp.*, 59 Bankr. 963, 968-69 (E.D. Pa. 1984); *In re AT of Maine, Inc.*, 56 Bankr. 55, 57 (Bankr. Me. 1985); *In re Heatron*, 34 Bankr. 526 (Bankr. W.D. Mo. 1983).

The plan has already been substantially consummated and therefore cannot now be revised and modified. *See Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), *dismissed as moot sub nom, Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46

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[9] *See* footnote 3.

(1988). In ruling in favor of the Liquidating Trustee in this case, the bankruptcy court held that "[i]t is simply impracticable, and may well nigh be impossible, to unwind the substantially consummated and confirmed plan." App. C at 36a. The government's failure to object when to have done so would have preserved the issue for review now precludes any attempt at further amendment. *See* 11 U.S.C. Section 1141(a); *In re St. Louis Freight Lines, Inc.*, 45 Bankr. 546, 552 (Bankr. E.D. Mich. 1984).

2. The Petitioners Are Estopped From Asserting A Tax Claim As An Administrative Or Other Expense Of The Miami Center Liquidating Trust

The Eleventh Circuit's decision is also consistent with the doctrine of estoppel, which precludes any attempt to hold the trust liable for the federal income taxes at issue. The plan has been substantially consummated for over five years. Silence on the question of whether such taxes were due under the plan meant that creditors and the bankruptcy court were led to believe the plan assets would be used to pay properly asserted and scheduled claims. Substantially all pre-petition creditors and most administrative creditors were paid years before the district court first imposed a stay at the Petitioners' request. Other claimants, such as attorneys, accountants and the Liquidating Trustee continue to perform services for the trust in reliance on the plan. The Petitioners offer no solution to resolve how monies validly paid to hundreds of creditors over five years ago can be recovered, or how payment to plan administrative creditors can be equitably resolved. The relief sought by the Petitioners is practically impossible, grossly unfair, and is precisely why the confirmed and substantially consummated plan cannot be dismantled. To require the Liquidating Trust to assume responsibility for payment of these taxes means that entirely innocent creditors who relied upon the disclosure statements and the plan of reorganization will be penalized because of the government's inaction. The Liquidating Trustee has simply carried out the plan as it is written. The Eleventh Circuit's decision recognized that the government is guilty of prejudicial delay in seeking relief and

the consequences of the unreasonableness of the relief now sought by the Petitioners.

In re International Horizons, Inc., 751 F.2d 1213 (11th Cir. 1985) is an excellent example of the application of this type of estoppel. In that case, the court held that estoppel precluded the Internal Revenue Service from asserting a post-confirmation claim for more than $20 million in corporate income taxes. Like the plan in this case, the plan in *International Horizons* scheduled and provided for payment of other federal tax claims, but did not provide for the income tax claim in question; and, just as in this case, the IRS neither filed an objection to the plan nor took any steps to put the parties on notice of the claim. During the confirmation hearing in *International Horizons*, an exchange occurred among the judge, the debtor and the IRS concerning the tax claims, but the government still did nothing to protect itself. In this case, an exchange regarding taxes occurred between the bankruptcy judge and the Debtors' attorney, but neither the Debtors nor the government did anything to resolve the issue. Just as in this case, the bankruptcy court in *International Horizons* confirmed the plan without objection from the IRS. When the IRS then attempted to assert the new tax claim, the Eleventh Circuit held that equitable considerations would not permit a post-confirmation amendment to allow payment of the previously unasserted IRS claim. 751 F.2d at 1217-19. The court's description of the government's conduct in *International Horizons* applies with equal force in this case:

> The Government had multiple opportunities to assert its claim timely; it did not. It had opportunity to object to the disclosure statement which did not schedule corporate income taxes; it did not. It was aware that the reorganization plan described payment only of *actual* tax liabilities and that the plan would be unviable should the government reach and prevail on the merits of its tax claim. Yet, it did not object to the plan either in writing or at the confirmation hearing. The bankruptcy court held that given the above behavior, the Service was estopped from asserting that a windfall would befall creditors absent the tax claims. We can find no abuse of

discretion in the court's equitable consideration of the Service's reorganization posture.

International Horizons, 751 F.2d at 1218-19.

The Eleventh Circuit's opinion is wholly consistent with the rule barring such late claims, and the government is estopped from now asserting the liability of the trust for the income taxes at issue.

3. The Tax Claim Does Not Have Priority

The Petitioners attempt to evade the mootness issue by arguing that the taxes are an administrative expense of the trust because the sale of the Washington properties occurred prior to confirmation, during the pendency of the Chapter 11 proceedings. This position is wrong.

By order of the bankruptcy court, the Debtors deposited the entire proceeds from the sale of the Washington properties into controlled bank accounts. No payment of taxes was made prior to confirmation and the plan expressly provided that all of the money in those accounts was available to the trust for payment of claims. It is now over six years since the sale and nearly six years after confirmation of the plan. No order was ever sought to determine whether the taxes in question are an administrative expense. The present claim for use of plan proceeds to pay income taxes as an administrative claim would simply rewrite the plan.

In a Chapter 11 proceeding, "administrative claims must ordinarily be paid no later than the effective date of a confirmed plan." 5 Collier on Bankruptcy 503.01. The alleged taxable event was described in the disclosure statement and in the plan, yet the government did nothing to notify anyone of its claims. It allowed everyone to act in reliance on the assumption there was no such claim.

The government is also not entitled to recover taxes on gain realized from the post-confirmation sale of the Miami Center as a first priority administrative expense because the plan's definition of an administrative claim does not include taxes and because a post-confirmation sale of realty is not an administrative expense of the bankruptcy estate entitled to

priority under the Bankruptcy Code. *See* 11 U.S.C. Sections 503 and 507.

The plan defines an "administrative claim" as the "actual, necessary expenses of preserving the consolidated estates of the debtors or operating their businesses, and allowances approved by the bankruptcy court." App. B at 21a. The alleged tax claim for gain on the sale of the Miami Center meets no part of this definition.

Further, the plan defines an "allowed claim" as one for which a proof of claim has been timely filed under the Bankruptcy Rules, or one which has been or is scheduled by the Debtors as liquidated and undisputed and to which no objection has been filed. *Id.* The alleged tax claim does not meet this definition either.

Bankruptcy Code Section 503(a) and Bankruptcy Rule 2016(a) require a claimant to file a request of payment of an administrative expense. *See In re Parker, Jr.*, 5 C.B.C.2d 913 (Bankr. E.D. Tenn. 1981), *aff'd*, 6 C.B.C.2d 1040 (E.D. Tenn. 1982) (the court requires a request for payment under Section 503(a)). No request has ever been made, hence the government's right to a claim is barred. The Eleventh Circuit's opinion is consistent with established law on this subject.

Even if the taxes were an "actual necessary expense" of preserving the Debtors' estates or operating the Debtors' businesses (which the Liquidating Trustee does not concede), the taxes are not an "allowed claim." The government was obligated to file a request for payment, set it for hearing and obtain a court order authorizing payment. As the government did none of these things, it is plain fairness and common sense that five and one-half years after confirmation, no change requiring payment of previously unasserted claims should be permitted. Certiorari should not be granted to review such a fact intensive question, particularly where three courts intimately familiar with this bankruptcy proceeding have found no merit in any of the Petitioners' arguments.

The Petitioners' reliance on 31 U.S.C. Section 3713 to establish priority is equally without merit. At trial, the government stated it was relying solely on Internal Revenue Code Sections 6012(b)(3) and (b)(4) as authority for its claim for

taxes. It took no discovery, introduced no testimony, and put on no evidence. At trial and in its post-trial memorandum, the government limited its argument to the effect of Section 6012(b). It was only in the appeal to the district court that the government asserted for the first time an administrative tax claim under 31 U.S.C. Section 3713. It was clearly improper to argue this statute for the first time on appeal. (Government's Petition for Writ of Certiorari at 14, no.11). *See Smith v. Horner*, 839 F.2d 1530, 1534 (11th Cir. 1988); *Capps v. Humble Oil and Refining Co.*, 536 F.2d 80 (5th Cir. 1976). In any event, Section 3713(a)(2) unequivocally provides: "[t]his subsection does *not* apply to a case under Title 11." (emphasis supplied). While the Liquidating Trustee is not a trustee under Title 11, as defined by any section of the Bankruptcy Code, the Debtors nonetheless filed Chapter 11 petitions under Title 11, and the plan was proposed as part of a Chapter 11 proceeding under Title 11, rendering Section 3713 inapplicable.

Assuming *arguendo* that the government does have a claim against the trust,[10] the tax claim would have a priority lower than that accorded to payment of pre-petition creditors and plan administrative expenses and, for reasons not applicable to whether the petitions should be granted, the bank would be responsible for the taxes. Liquidating Trustee's App. A at 5-6a.

In *United States v. Redmond*, 36 Bankr. 932 (D. Kan. 1984), the court held that taxes incurred post-confirmation were not an administrative claim against a post-confirmation trust. 36 Bankr. at 933. *Redmond* rejected the government's argument that it held an administrative claim:

> The government contends that the 'estate' continues to exist from the commencement of the case, throughout the administering of the estate and until the closing of the case. Taxes incurred by the reorganized debtor, it is argued, should be entitled to

[10] The lower courts never reached the issue of priority because of their uniform determination that the trust is not responsible for such tax reporting or payment.

> treatment as administrative expenses. Under the facts of this case, the government's argument is not persuasive to the Court. It is clear that upon confirmation of a plan of reorganization, property of the bankruptcy estate vests in the reorganized debtor, a new entity, and administration of the estate ceases. As such, the tax liability of the reorganized debtor was not incurred in administering the bankruptcy estate. As a post-confirmation creditor, the IRS is not without remedies in dealing with the reorganized debtor.

36 Bankr. at 934.

The government in this case is not entitled to claim taxes on income earned by the post-confirmation sale of the Miami Center as an administrative expense of the trust because by definition, the plan does not provide for it. The plan is binding on the IRS, the Debtors, and every other creditor, even though it may "ultimately provide it [the government] with less than that to which it is otherwise entitled." *St. Louis Freight Lines*, 45 Bankr. at 552. This rule has been applied against both the IRS and other taxing authorities. *See, e.g., International Horizons, supra; In re Hebert*, 61 Bankr. 44, 47 (Bankr. W.D. La. 1986); *In re Sapienza*, 27 Bankr. 526 (Bankr. W.D. N.Y. 1983); *Western Thrift and Loan Ass'n v. Blair*, 21 Bankr. 316 (Bankr. S.D. Ca. 1982); *see also In re Todd* No. 1-8400998, slip. op. (Bankr. N.D. Ca. June 2, 1989) (government bound to Chapter 13 plan otherwise flawed by its failure to provide for taxes owed on transfer of realty pursuant to plan, where government failed to object to the plan). "Absent affirmative action at or prior to the confirmation hearing, the Internal Revenue Service, like any other creditor, has effectively waived any right to object to its treatment under the plan." *In re Hebert*, 61 Bankr. at 47. To grant the government a priority claim would be a windfall at the expense of the Debtors' legitimate creditors.

4. The Trust Is Not Responsible For The Debtors' Income Taxes Under The Internal Revenue Code.

The determination that the Miami Center Liquidating Trust is not responsible for taxes is consistent with the treatment provided by the Internal Revenue Code. Section 6012(b) of the Code, and those cases interpreting it, establish that the Miami Center Liquidating Trust is not a taxable entity.

In their attempt to broaden the scope of Internal Revenue Code Sections 6012(b)(3) and (b)(4) to apply to the Liquidating Trust, the Petitioner-Debtors claim that the Eleventh Circuit's decision does "violence" to the statutory scheme, while the government says it is a "distortion" of the Bankruptcy Code. In fact, the only damage to the statutory scheme is that perpetrated by the Petitioners in attempting to extend the law to the Liquidating Trustee. Tax statutes are "not to be extended by implication beyond the clear import of the language used and, in case of doubt, are construed most strongly against the government." *Greyhound Corp. v. United States*, 495 F.2d 863 (9th Cir. 1974). The obvious reason for this view is the maxim that the power to tax is the power to destroy, and "Congress could have manifested any other intent by a limiting or qualifying provision." *Frankel v. United States*, 192 F.2d 666 (8th Cir.), *cert. denied*, 371 U.S. 903 (1962). As Section 6012(b) does not expressly apply to the Liquidating Trustee, its applicability cannot be broadened to do so absent congressional amendment.

a. The trust is a grantor trust

The trust is a grantor trust as defined under Subpart E of Subchapter J of the Internal Revenue Code, 26 U.S.C. Sections 671-79. Therefore, the trust has no responsibility to pay the Debtors' federal income taxes. The Debtors, as the beneficial owners of the trust, are taxed separately. *See United States v. Buttorff*, 563 F. Supp. 450, 454 (N.D. Tex. 1983), *aff'd*, 761 F.2d 1056, 1060-61 (5th Cir. 1985); *In re Sonner*, 53 Bankr. 859 (Bankr. E.D. Va. 1985).

Sonner further demonstrates that the Eleventh Circuit's opinion below is consistent with tax and bankruptcy laws. The

Sonner court held that a post-confirmation trust identical to the Miami Center Liquidating Trust was a grantor trust and was not a taxable entity. 53 Bankr. at 866. In *Sonner*, the debtor's voluntary Chapter 11 resulted in a confirmed plan which required the debtor to convey his interest in realty to a creditors' trust, which in turn required the liquidation of realty at specified prices for the benefit of the debtor's creditors. That is precisely what the confirmed plan in the instant case provides. And like the plan *sub judice*, the *Sonner* trust did not provide for the payment of taxes on any gain realized from the sale of the debtor's real estate. The issue in that case was "whether the [post-confirmation] Creditors' Trust is the entity responsible for the payment of tax resulting from the sale of the parcels of real estate." *Sonner*, 53 Bankr. at 860. The Court held the answer was no.

Relying on Internal Revenue Code Section 6012(b) and 28 U.S.C. Section 960, the *Sonner* court held the trust was not responsible for the payment of any capital gains tax resulting from the sale of trust property because the trust was a grantor trust, as defined in Subchapter J of the Internal Revenue Code, and the grantor-debtor, as the ultimate owner of the trust, was liable for the taxes. *Sonner*, 53 Bankr. at 866.

The term "trust" referred to in Section 6012(b)(4) does not apply to the Liquidating Trust herein, both because it is not a Chapter 7 or Chapter 11 estate, and because Section 6012(b)(4), read *in pari materia* with 26 U.S.C. Sections 671-79 and Revenue Regulation Sections 1.677(a)-1(d), 1.672(b)-1, 1.672(a)-1(a) and 1.672(a)-1(b), makes it clear that the statute's use of the term "trust" *excludes* grantor trusts. Thus, Section 6012(b)(4) is not applicable to the Miami Center Liquidating Trust.

Stockton v. United States, 335 F.Supp. 984, 986 (C.D. Cal. 1971) also supports this conclusion. In *Stockton*, the plaintiff and his corporations transferred all of their assets to a third party who was required to liquidate the assets and distribute the proceeds to creditors in order to discharge corporate obligation which the debtor had guaranteed. The *Stockton* court found this arrangement to be a trust and held that because the purpose of the trust was to pay the grantor's

indebtedness, the debtor was treated as the owner of the trust for income tax purposes, and the trust was not a taxable entity.

Although the trust in *Stockton* did not arise out of a bankruptcy proceeding, the similarities to the Miami Center Liquidating Trust and the *Sonner* trust cannot be overlooked. The *Stockton* trust, the *Sonner* trust, and the Miami Center Liquidating Trust are all instruments created for the sole purpose of liquidating assets owned by debtors to pay their creditors, and in doing so, to discharge the debtors from their legal obligations. The *Sonner* court concluded:

> Based on this Court's consideration of both the grantor trust provisions of the Internal Revenue Code and the *Stockton* opinion, this Court is unable to limit *Stockton* to a non-bankruptcy situation. Whether Sonner is discharged in bankruptcy has no effect on the provisions of the plan which without modification in this Court must be carried out. Furthermore, Sonner's discharge is irrelevant as to the effect the Internal Revenue Code, has with respect to the tax attributes of the plan. As a result, there seems little doubt but that the trust is a grantor trust as defined in Subchapter J of the Internal Revenue Code.

53 Bankr. at 865.

b. The Liquidating Trustee is a contract trustee.

The Petitioners' argument that Sections 6012(b)(3) and (b)(4) apply to the Liquidating Trustee fails because the Liquidating Trustee is not a trustee in a case under Title 11, a receiver, or an assignee. The Eleventh Circuit's affirmance of the lower courts' finding that the trustee's duties are more analogous to those of a disbursing agent is not an appropriate subject for review in this Court because it is a fact determination already approved by the trial court and affirmed through two levels of appellate review. *See Rogers*, 458 U.S. at 624; *Graver*, 336 U.S. at 275.

Section 6012(b) has no application to the Liquidating Trustee because he was named under a plan confirmed in a

bankruptcy proceeding which became effective *after* confirmation. Thus, he never served as a Title 11 bankruptcy trustee. His appointment, his responsibilities and his authority all arise by reason of the contract which established the Miami Center Liquidating Trust. The Debtors have repeatedly asserted that the Liquidating Trustee is not a bankruptcy trustee in a long line of appeals to this and other courts. Because he is not, those cases cited as proof of the applicability of Sections 6012(b)(3) and (b)(4) are not on point. None involved a trustee appointed to administer a liquidating trust arising upon confirmation of a plan. *In re I.J. Knight Realty Corp.*, 501 F.2d 62 (3d Cir. 1974), *In re Mid America Co.*, 31 F.Supp. 601 (S.D. Ill. 1939), *Louisville Property Co. v. Commissioner*, 140 F.2d 547 (6th Cir. 1944), *cert. denied*, 322 U.S. 755 (1944), and the other cases relied on by the Petitioners' (Debtors' Petition for Writ of Certiorari at 24, n. 29, 25, n. 31 and Government's Petitions for Writs of Certiorari at 9-15), do not conflict with the Eleventh Circuit's opinion below.

The evidence at trial established that the Liquidating Trustee is only a contract trustee. As the district court properly concluded: "Because of the limited and essentially ministerial functions assigned to the Liquidating Trustee by the Amended Plan, *see* Amended Plan, Art. V at 43, the Liquidating Trustee is a contract trustee, rather than a 'trustee in a case under title 11;' further, the Liquidating Trustee's nondiscretionary duties to identify and pay allowed claims in accordance with the terms of the Amended Plan are more akin to those of a disbursing agent, rather than an assignee or fiduciary. *See In re Alan Wood Steel Co.*, 7 Bankr. 697 (Bankr. E.D. Pa. 1980)." App. B at 24a. The Eleventh Circuit concurred: "If Congress had intended that all trustees be subjected to the provisions of section 6012, it would have so provided. We also conclude that section 6012 was not intended to apply to a broad range of individuals without regard to the functions which they perform." App. A at 11a.

The gist of the Petitioners' contention is that because the Liquidating Trustee's duties are similar to those of a bankruptcy trustee, perforce he is a trustee under Title 11 and is

subject to Section 6012(b). That is neither true nor logical. The uncontroverted fact is that the Liquidating Trustee was *not* appointed as a Title 11 trustee of a Chapter 11 estate in accordance with the Bankruptcy Code and the Bankruptcy Rules. His powers are not coextensive with those of a trustee in a case under Title 11. He does not have the strong arm authority given trustees under Section 544 of the Bankruptcy Code, nor does he have the power to avoid preferential and fraudulent transfers under Bankruptcy Code Sections 547 and 548. His powers are fixed entirely by contract and not by the Code. He is to pay creditors in accordance with a plan he had no hand in creating. He is not even compensated in the same manner as a Title 11 trustee. It would be entirely inappropriate to grant certiorari to review such a factual determination.

The Petitioners have also argued that the Liquidating Trustee is nonetheless a "trustee under title 11" because the Debtors sought protection in the bankruptcy court under Title 11 and because the bankruptcy court confirmed the plan of reorganization pursuant to Chapter 11. That does not make the Liquidating Trustee a trustee under Title 11, however. Simply because the plan was confirmed in a Chapter 11 proceeding under Title 11 does not confer the status of "bankruptcy trustee" on the Liquidating Trustee. He is an entirely different creature having different powers and responsibilities. The government argues that because no case has ever used the term "contract trustee," the term cannot legally exist. Whether that term has been used before is irrelevant. The status of the Liquidating Trustee is determined by the confirmed plan. Respondent Smith was appointed pursuant to a plan that is no longer subject to challenge.[11] Whatever term one uses to describe the Liquidating Trustee, it is plain that he is not a trustee, assignee or fiduciary as defined by Internal Revenue Code Section 6012(b). The Petitioners' attempt to extend the applicability of Section 6012(b) should fail.

---

[11] In addition to not appealing the confirmation order, the government never appealed the August 12, 1985 order appointing Smith as Trustee of the Miami Center Liquidating Trust.

Both the Debtors and the government conceded at the outset of the trial in the bankruptcy court that the trust is not a separate taxable entity. If it is not such an entity, it has no duty to file a tax return and, under 26 U.S.C. Section 6151, it has no duty to pay any tax.

Despite the legal gymnastics used in an attempt to mold the tax laws to apply to the Liquidating Trustee, the Petitioners have not explained why the Eleventh Circuit's reliance on *Alan Wood Steel* conflicts with established law. The court in *Alan Wood Steel* held that 26 U.S.C. Section 6012(b)(3), the only Internal Revenue Code provision which deals with persons required to file tax returns in the bankruptcy context, does not apply to a disbursing agent because he is not a receiver, a trustee in bankruptcy, or an assignee of the debtor corporation. 7 Bankr. at 700. Clearly then, not every entity serving to carry out the terms of a confirmed plan is liable to file tax returns and pay taxes on gain realized from the sale of a debtor's property. Like the disbursing agent in *Alan Wood Steel*, the Liquidating Trustee has the duty to identify plan assets and to collect and distribute those assets for distribution to allowed creditors, as provided for in the plan. He has no discretion beyond his authority to use the assets of the trust for payment of its allowed claims. He never operated the Debtors' business and he never exercised any authority other than as provided in the plan.

Not only is the Liquidating Trustee not a bankruptcy trustee, he is not an assignee under Section 6012(b). "[A] disbursing agent is not an assignee of the corporation since there is no assignment to him of property of the debtor corporation." *In re Alan Wood Steel Co.*, 7 Bankr. at 700, citing Black's Law Dictionary 109 (5th ed. 1979). In the instant case, there was no assignment. The Liquidating Trustee holds trust property pursuant to a confirmed plan by court order, and he only holds this property on an interim basis until it can be paid over to plan creditors. The plan provides that any property remaining after all allowed creditors are paid is returned to the Debtors.

Additionally, if Congress had intended to require the filing of a tax return by a contract trustee whose sole responsibility is to pay the Debtors' legal obligations, it could have explicitly provided for this in Section 6012(b) or elsewhere in the Internal Revenue Code. It is evident that liquidating trusts are not new creations about which Congress knew nothing and for which Congress could not provide. The Bankruptcy Code itself contemplates the creation of such a trust to carry out the terms of a plan of reorganization. *See* 11 U.S.C. Section 1142(a). Use of liquidating trustees and agents, appointed pursuant to a plan of reorganization, has been approved in a number of cases and is consistent with the Bankruptcy Code. *See, e.g.*, 11 U.S.C. Section 1123; *In re Jorgenson*, 66 Bankr. 104 (9th Cir. B.A.P. 1986).

There is, therefore, no authority to extend Section 6012(b) or any other provision of the Internal Revenue Code to the Liquidating Trust in these proceedings. The Eleventh Circuit's decision is consistent with federal law and should be upheld.

CONCLUSION

For all of the reasons set forth herein, the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

HERBERT STETTIN, Counsel for
the Liquidating Trustee
HERBERT STETTIN, P.A.
One S. E. Third Avenue #2215
Miami, Florida 33131
Telephone (305) 374-3353

Nos. 90-1361, 90-1484

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

IN RE HOLYWELL CORPORATION, THEODORE B. GOULD, MIAMI CENTER CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP AND CHOPIN ASSOCIATES,

Debtors.

HOLYWELL CORPORATION, THEODORE B. GOULD, MIAMI CENTER CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, and CHOPIN ASSOCIATES, and THE UNITED STATES OF AMERICA,

Petitioners,

vs.

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, and THE BANK OF NEW YORK,

Respondents.

APPENDIX TO THE BRIEF OF FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI FILED BY THE DEBTORS AND THE UNITED STATES OF AMERICA

APPENDIX

APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST

Plaintiff

vs.

THE UNITED STATES OF AMERICA, THE BANK OF NEW YORK, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, HOLYWELL CORPORATION, AND THEODORE B. GOULD

Defendants

CASE NO: 84-01590/ 91/92/93/94 BKC SMW

ADVERSARY NO. 87-0627 -BKC-SMW-A

ADVERSARY COMPLAINT FOR DECLARATORY RELIEF

1. This is an adversary proceeding for a declaratory judgment. The court has jurisdiction over the parties and the subject matter, pursuant to 28 U.S.C. Sections 157 and 1334 (a), and Bankruptcy Rule of Procedure 7001 (a).

2. The Internal Revenue Service is an agency of the United States of America.

3. The Bank of New York is a New York Banking Corporation. Miami Center Limited Partnership (MCLP); Miami Center Corporation (MCC); Chopin Associates (Chopin); Holywell Corporation (Holywell); and Theodore B. Gould (Gould) are each debtors (hereinafter debtors) in proceedings pending before this court under case numbers 84-01590/91/92/93/94. The bankruptcy cases have been substantively consolidated.

4. The Bank of New York proposed an Amended Plan of Reorganization for the debtors. The Plan was confirmed by this Court and, as modified on remand, was affirmed by the District Court. The Eleventh Circuit Court of Appeals thereafter dismissed the appeal on the ground the Plan had been substantially consummated, and hence no effective relief could be granted. The matter pends in the Eleventh Circuit on rehearing.

5. As confirmed, the Plan provides for the establishment of the Miami Center Liquidating Trust (the Trust) and the appointment of a Trustee for the purpose of determining the identity, amount and validity of claims. In addition, the Trustee was appointed to disburse the sums due as payment of claims under the Plan. The Plan required the Trustee to convey the Miami Center property (the Pavilion Hotel, the Edward Ball Office Building, the Podium and the parking garages) to the Bank of New York for $255,600,000, from which the Bank's lien would be satisfied. The Plan requires the debtors to fully cooperate in carrying out its terms.

6. This Court had previously ordered the Trustees to take control of proceeds from the sale of properties in

which Holywell, Gould and Twin Development Corporation (a wholly owned subsidiary of Holywell) had an interest, and to use these funds (the Washington Proceeds) for the payment of creditors, as provided in the Plan.

7. The Plan provides for discharge of the debtors, and, after the payment of all creditors and the entry of a final decree, for the dismissal of these proceedings.

8. The Plan was confirmed in August, 1985. The Trustee conveyed the Miami Center Property to the nominee of the Bank of New York on October 10, 1985.

9. No provision was made in either the Plan or the Order authorizing the Trust to use the Washington Proceeds for payment of income taxes on any gain realized by the debtors from the sale of the Washington and Miami Center properties.

10. In each interim report filed by the Trustee concerning the identification and payment of creditors and the establishment of reserves for disputed and unliquidated claims, there was no provision made for the payment of income taxes on any gain realized by the debtors from the sale of the Washington and Miami Center properties.

11. Holywell Corporation and subsidiaries' consolidated federal income tax return for the fiscal year ending July 31, 1984, has only just been filed. The debtors have advised the Trustee they are in the process of preparing the 1984-1985 (7/31/85) fiscal year return and should be ready to file the return shortly. This return will include the gain on the sale of the Washington properties. Income

taxes relating to this gain may be partially or totally offset by prior net operating loss carryforwards. The 1985-86 (7/31/86) fiscal year return has yet to be prepared. However, the debtors have recently informed the Trustee, the 7/31/86 return will reflect a significant tax liability (many millions of dollars) due to the sale of the Miami Center properties. The debtors have advised the Trustee they will not file the 7/31/86 return.

12. The Plan requires payment of creditors in strict priority, that is, each creditor of a senior class must be paid, or an adequate reserve established for payment of unliquidated or disputed claims before payment of any junior class may be made. No payment has been made nor has any reserve been established for the payment of income taxes which may be due on the gain realized from sale of the Washington and Miami Center properties. Many claims in Classes 1 through 6 have been paid, despite the failure to determine, pay or reserve for these income taxes.

13. The Trustee has determined that if the Trust is obliged by law to be responsible for the payment of these income taxes there will be insufficient funds remaining in the Trust for the payment of allowed or previously reserved claims, including administrative and post-confirmation fees and expenses.

14. If the Trust is obliged by law to pay these income taxes, to determine the income tax liability the Court must first order the debtors to promptly prepare and file the federal income tax returns for all applicable periods. If the tax is due and no other source of payment of claims is available from Trust assets, the Trustee may

be required to determine the source and amount of recoupment from sums previously paid to junior classes of creditors in order to properly pay claims in order of strict priority.

15. The Trustee believes that the Trust itself is not a separate entity for federal income tax purposes. Therefore, the interest income earned by the Trust has not been reported on an income tax return filed by the Trust. However, the Trustee has been informed that the debtors are including their share of the Trust's interest income on their own federal income tax returns.

16. The Trustee is uncertain as to his authority to pay existing allowed claims, orders determining administrative and post-confirmation fees, and costs until the determinations of tax liability has been made. The orderly administration of the Trust requires the Trustee to have the immediate ability to pay administrative claims including fees and costs to professionals needed to assist in the resolution of these issues.

17. The Bank of New York was the proponent of the Plan and the Disclosure Statement upon which confirmation was obtained. These documents were relied upon by creditors and the Court in obtaining the Order of Confirmation. It failed to include a provision for payment or reservation of the income taxes on the gain from sale of the Washington and Miami Center properties. The Bank of New York is also a creditor of the Trust, claiming a right of reimbursement for fees and costs superior to any income tax indebtedness of the Trust. The Trustee is uncertain as to the priority of payment of this and other

claims asserted by the debtors as being entitled to right of payment from the assets of the Trust.

18. The Trustee contends the Trust is not responsible to file the 1985-1986 tax return under applicable tax and bankruptcy law, and is not liable to pay any income tax due the IRS. If the trust is liable for such taxes, then in that event the Bank of New York should be held responsible for all such payment because it proposed the Plan without providing the means to pay such taxes; because it failed to disclose the obligation to pay such taxes in the disclosure statement upon which creditors and the Court relied; and because the Bank of New York agreed to indemnify and hold the Trustee harmless for any claims as a result of his execution of the deed of conveyance of the Miami Center property.

19. The Trustee is in need of immediate declaratory relief regarding the obligation to file tax returns and the payment of income tax liabilities. The Trustee requests the Court to order the debtors to:

a. Prepare and file a tax return reflecting any tax liability from the sale of the Washington properties.

b. Prepare and file a fiscal 1985-1986 tax return reflecting any tax liability from the sale of the Miami Center properties.

The Trustee requests the Court to determine the rights and obligations of the Trust to:

a. Pay income taxes due, if any, on the sale of the Washington property.

b. Pay income taxes due, if any, on the sale of Miami Center property.

c. Determine priority in right of payment of all remaining unpaid claims, including those asserted by the debtors.

d. Obtain liquidation of all remaining assets and interests in property owned by the consolidated debtors in the event the Trust is without sufficient assets to pay all allowed claims, fees and costs.

e. Seek recovery for any sums previously paid out of strict priority in the event the Trust is without sufficient assets to pay all claims entitled to priority of payments.

f. Determine the liability of the Bank of New York for any income taxes which may be due.

g. The Trust should be immediately authorized to pay orders allowing fees and accrued administrative and post confirmation fees, costs and expenses of professionals, including those fees, costs and expenses incurred in the resolution of these issues.

h. Determine the Trust's liability for income taxes on interest income earned by the Trust.

Respectfully submitted,

HERBERT STETTIN, P.A.
ONE S. E. THIRD AVENUE #2215
MIAMI, FLORIDA, 33131
TELEPHONE 305-374-3353

BY: /s/ Herbert Stettin
Herbert Stettin

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: HOLYWELL CORPORATION, et al., Debtor.	CASE NO: 88-0795-CIV-KEHOE (Filed JUN 20 1988)
THE UNITED STATES OF AMERICA, et al., Appellants, v. FRED STANTON SMITH, as Liquidating Trustee of the Miami Center Liquidating Trust, Appellees.	ORDER OF STAY

THIS MATTER arose before the Court upon the Appellants' emergency motion to stay the Final Judgment entered by the United States Bankruptcy Court on April 28, 1988, and the court's hearing thereon. After careful consideration, it is hereby

ORDERED AND ADJUDGED that the Appellants' Emergency Motion for Stay is GRANTED. *See Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986).

It is further

ORDERED AND ADJUDGED that the parties SHALL SUBMIT in writing an agreed accelerated briefing schedule within three (3) days of the date of this Order. If the

parties fail to do so, the Court will establish an accelerated briefing schedule.

DONE AND ORDERED in Chambers at Miami, Florida, this 20th day of June, 1988.

/s/ James W. Kehoe
JAMES W. KEHOE
UNITED STATES
DISTRICT JUDGE

copies furnished to: Theodore B. Gould, Vance E. Salter, Esq., Alvarez Lecesne, Jr., Esq., Herbert Stettin, Esq., Robert M. Musselman, Esq., S. Harvey Ziegler, Esq., Robert Mark, Esq., Frank DeLeon, Esq., Barbara E. Vicevich, Esq.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 89-5862

(Filed SEP. 8, 1989)

IN RE: HOLYWELL CORPORATION,

Debtor.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

SHUTTS & BOWEN,
HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES,
THEODORE B. GOULD,

Plaintiffs,

versus

FRED STANTON SMITH, as Trustee of
the Miami Center Liquidating Trust
and BANK OF NEW YORK,

Defendant-Appellee.

IN RE: HOLYWELL CORPORATION,

Debtor.

HOLYWELL CORPORATION,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES and
THEODORE B. GOULD,

Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant.

On Appeal from the United States District Court
the Southern District of Florida

Before RONEY, Chief Judge, KRAVITCH and EDMONDSON, Circuit Judges.

BY THE COURT

The motion for stay pending appeal of the judgment and order in this case is GRANTED.

The previous order expediting the appeal remains in effect.

Appellant's motion for leave to file a response is moot.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5862

(Filed Jan. 17, 1991)

IN RE: HOLYWELL CORPORATION,
Debtor.

FRED STANTON SMITH,
as Trustee of the Miami Center Liquidating Trust,
Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,
HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES and
THEODORE B. GOULD,
Defendants-Appellants,

SHUTTS & BOWEN,
Intervenor-Appellee,

BANK OF NEW YORK,
Defendant-Appellee.

IN RE: HOLYWELL CORPORATION,
Debtor.

FRED STANTON SMITH,
as Trustee of the Miami Center Liquidating Trust,
Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant,

HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES and
THEODORE B. GOULD,
Defendants-Appellants,

SHUTTS & BOWEN,
Intervenor-Appellee,

BANK OF NEW YORK,
Defendant-Appellee.

On Appeal from the United States
District Court for the
Southern District of Florida

ORDER:

(X) The motion of Appellants for (X) stay ( ) recall and stay issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Appellants for ( ) stay ( ) recall and stay of the mandate pending petition for writ of certiorari is GRANTED to and including ___, ___ the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period mentioned above there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ John Hatchett
UNITED STATES
CIRCUIT JUDGE

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

January 22, 1991

Mr. Herbert Stettin
One S.E. Third Avenue, #2215
Miami, FL 33131

Re: Holywell Corporation, et al.,
v. Fred Stanton Smith, et al.,
Application No. A-546

Dear Mr. Stettin:

The application for a stay of mandate and to reinstate injunction pending timely filing and disposition of petition for writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on January 22, 1991 endorsed thereon the following:

"Denied
Jan. 22, 1991
Anthony M. Kennedy"

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By /s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

NOTE – FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR., CLERK OF THE COURT — AREA CODE 202 479-3011

NOTIFICATION LIST

Mr. Dennis G. Lyons
Arnold & Porter
1200 New Hampshire Ave., NW
Washington, DC 20036

Mr. Kenneth W. Starr
Solicitor General
U.S. Department of Justice
Washington, DC 20530

Mr. Vance E. Salter
Coll Davidson Carter, et al.
201 S. Biscayne Blvd., #3200
Miami, FL 33131

Mr. Herbert Stettin
One S.E. Third Avenue, #2215
Miami, FL 33131

Ms. Barbara E. Vicevich
Shutts & Bowen
201 S. Biscayne Blvd., #1500
Miami, FL 33131

APPENDIX F

* * *

[p.51] position but we think, so that we can get some focus here this afternoon, that we should defer argument on that matter.

We agree with the trustee's position that the trustee is not liable, that the debtors are liable to file returns and to pay the taxes, and we would reserve the right to argue the secondary issues only if it's necessary to argue them.

Also, Your Honor, we have filed a reasonably brief memorandum of law with the Court and we hope the Court will consider that.

THE COURT: First witness.

MR. STETTIN: You've heard it. I will simply disagree with a number of the items that Mr. Gould and Mr. Musselman have stated, but I think it's appropriate during the trial.

MR. GOULD: Can I read something to the Court before the trial begins?

THE COURT: Surely.

MR. GOULD: It's two things. This is a transcript, part of a transcript from July 18, 1985, Pages 98 and 99. This is the substantive consolidation hearing. This is Judge Britton speaking to the Bank of New York and to our counsel. I in fact was not there.

"THE COURT: The last point I want to touch [p. 52] on are the tax consequences. In this area, I readily

concede that I am a babe in the woods and haven't the foggiest notion of what the tax consequences would be on the particular decision. If a modification of this plan or any other adjustment can be made to eleviate adverse tax consequences for the debtors, then I think that a request for such a modification ought to be respected and honored, and I would so as long as I have the discretion to do so intend to accomplish that result.

"I think all of us have recognized in our discussion that there might be tax consequences. We are not certain if we have considered all that we could do to eleviate the adverse tax consequences."

As a tax expert, I will tell you there is only one way that can be done and that is by not selling Miami Center Limited Partnership's assets.

The Bankruptcy Court on January 29, 1986, adopted verbatim the findings of fact proposed by the Bank of New York. Page [sic] 40 and 41, it says:

> "There has been no evidence to substantiate the debtors' claims that substantive consolidation will somehow cost them [p. 53] approximately $17 million in Federal income taxes."

Now, when you read the bank's memorandum, I think you ought to read it in the light of, one, of their knowledge that there were adverse tax consequences. Presumeably [sic] they are sophistated [sic] businessmen, they know that a sale of assets results in tax liabilities.

Secondly, the findings of fact that they induced Judge Britton to adopt verbatim that there was no evidence of a tax liability.

Thank you.

MR. STETTIN: Would Your Honor care to take a short recess? You have been going since 1:00.

THE COURT: Five minutes, please.

(Whereupon, a short recess was had, after which the following proceedings in the foregoing hearing were had:)

THE COURT: First witness, please.

MR. STETTIN: Don Denkhous.

APPENDIX G

STATUTES

11 U.S.C. Section 503

§ 503. Allowance of administrative expenses

(a) An entity may file a request for payment of an administrative expense.

(b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including –

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

(B) any tax –

(i) incurred by the estate, except a tax of a kind specified in section 507(a)(7) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by –

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title; or

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title; and

(6) the fees and mileage payable under chapter 119 of title 28.

11 U.S.C. Section 507

§ 507. Priorities

(a) The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

* * *

(7) Seventh, allowed unsecured claims of governmental units, only to the extent that such claims are for –

(A) a tax on or measured by income or gross receipts –

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax assessed before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

* * *

11 U.S.C. Section 1127

§ 1127. Modification of plan

* * *

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

11 U.S.C. Section 1141

§ 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in, the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

* * *

11 U.S.C. Section 1142

§ 1142. Implementation of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

* * *

26 U.S.C. Section 671

§ 671. Trust income, deductions, and credits attributable to grantors and others as substantial owners

Where it is specified in this subpart that the grantor or another person shall be treated as the owner of any portion of a trust, there shall then be included in computing the taxable income and credits of the grantor or the other person those items of income, deductions, and credits against tax of the trust which are attributable to that portion of the trust to the extent that such items would be taken into account under this chapter in computing taxable income or credits against the tax of an individual. Any remaining portion of trust shall be subject to subparts A through D. No items of a trust shall be included in computing the taxable income and credits of the grantor or of any other person solely on the grounds of his dominion and control over the trust under section 61 (relating to definition of gross income) or any other provision of this title, except as specified in this subpart.

26 U.S.C. Section 672

§ 672. Definitions and rules

(a) Adverse party. – For purposes of this subpart, the term "adverse party" means any person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of the power which he possesses respecting the trust. A person having a general power of appointment over the trust property shall be deemed to have a beneficial interest in the trust.

(b) Nonadverse party. – For purposes of this subpart, the term "nonadverse party" means any person who is not an adverse party.

(c) Related or subordinate party. – For purposes of this subpart, the term "related or subordinate party" means any nonadverse party who is –

> **(1)** the grantor's spouse if living with the grantor;
>
> **(2)** any one of the following: The grantor's father, mother, issue, brother or sister; an employee of the grantor; a corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control; a subordinate employee of a corporation in which the grantor is an executive.

For purposes of sections 674 and 675, a related or subordinate party shall be presumed to be subservient to the grantor in respect of the exercise or nonexercise of the powers conferred on him unless such party is shown not to be subservient by a preponderance of the evidence.

(d) Rule where power is subject to condition precedent. – A person shall be considered to have a power described in this subpart even though the exercise of the power is subject to a precedent giving of notice or takes effect only on the expiration of a certain period after the exercise of the power.

(e) Grantor treated as holding any power or interest of grantor's spouse. –

(1) In general. – For purposes of this subpart, a grantor shall be treated as holding any power or interest held by –

(A) any individual who was the spouse of the grantor at the time of the creation of such power or interest, or

(B) any individual who became the spouse of the grantor after the creation of such power or interest, but only with respect to periods after such individual became the spouse of the grantor.

(2) Marital status. – For purposes of paragraph (1)(A), an individual legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.

26 U.S.C. Section 673

§ 673. Reversionary interests

(a) General rule. – The grantor shall be treated as the owner of any portion of a trust in which he has a reversionary interest in either the corpus or the income therefrom, if, as of the inception of that portion of the

trust, the value of such interest exceeds 5 percent of the value of such portion.

(b) Reversionary interest taking effect at death of minor lineal descendant beneficiary. – In the case of any beneficiary who –

(1) is a lineal descendant of the grantor, and

(2) holds all of the present interests in any portion of a trust

the grantor shall not be treated under subsection (a) as the owner of such portion solely by reason of a reversionary interest in such portion which takes effect upon the death of such beneficiary before such beneficiary attains age 21.

(c) Special rule for determining value of reversionary interest. – For purposes of subsection (a), the value of the grantor's reversionary interest shall be determined by assuming the maximum exercise of discretion in favor of the grantor.

(d) Postponement of date specified for reacquisition. – Any postponement of the date specified for the reacquisition of possession or enjoyment of the reversionary interest shall be treated as a new transfer in trust commencing with the date on which the postponement is effective and terminating with the date prescribed by the postponement. However, income for any period shall not be included in the income of the grantor by reason of the preceding sentence if such income would not be so includible in the absence of such postponement.

26 U.S.C. Section 674

§ 674. Power to control beneficial enjoyment

(a) General rule. – The grantor shall be treated as the owner of any portion of a trust in respect of which the beneficial enjoyment of the corpus or the income therefrom is subject to a power of disposition, exercisable by the grantor or a nonadverse party, or both, without the approval or consent of any adverse party.

(b) Exceptions for certain powers. – Subsection (a) shall not apply to the following powers regardless of by whom held:

(1) Power to apply income to support of a dependent. – A power described in section 677(b) to the extent that the grantor would not be subject to tax under that section.

(2) Power affecting beneficial enjoyment only after occurrence of event. – A power, the exercise of which can only affect the beneficial enjoyment of the income for a period commencing after the occurrence of an event such that a grantor would not be treated as the owner under section 673 if the power were a reversionary interest; but the grantor may be treated as the owner after the occurrence of the event unless the power is relinquished.

(3) Power exercisable only by will. – A power exercisable only by will, other than a power in the grantor to appoint by will the income of the trust where the income is accumulated for such disposition by the grantor or may be so accumulated in the discretion of the grantor or a nonadverse party, or both, without the approval or consent of any adverse party.

(4) Power to allocate among charitable beneficiaries. – A power to determine the beneficial enjoyment of the corpus or the income therefrom if the corpus or income is irrevocably payable for a purpose specified in section 170(c) (relating to definition of charitable contributions).

(5) Power to distribute corpus. – A power to distribute corpus either –

(A) to or for a beneficiary or beneficiaries or to or for a class of beneficiaries (whether or not income beneficiaries) provided that the power is limited by a reasonably definite standard which is set forth in the trust instrument; or

(B) to or for any current income beneficiary, provided that the distribution of corpus must be chargeable against the proportionate share of corpus held in trust for the payment of income to the beneficiary as if the corpus constituted a separate trust.

A power does not fall within the powers described in this paragraph if any person has a power to add to the beneficiary to beneficiaries or to a class of beneficiaries designated to receive the income or corpus, except where such action is to provide for after-born or after-adopted children.

(6) Power to withhold income temporarily. – A power to distribute or apply income to or for any current income beneficiary or to accumulate the income for him, provided that any accumulated income must ultimately be payable –

(A) to the beneficiary from whom distribution or application is withheld, to his estate, or to his appointees (or persons

named as alternate takers in default of appointment) provided that such beneficiary possesses a power of appointment which does not exclude from the class of possible appointees any person other than the beneficiary, his estate, his creditors, or the creditors of his estate, or

(B) on termination of the trust, or in conjunction with a distribution of corpus which is augmented by such accumulated income, to the current income beneficiaries in shares which have been irrevocably specified in the trust instrument.

Accumulated income shall be considered so payable although it is provided that if any beneficiary does not survive a date of distribution which could reasonably have been expected to occur within the beneficiary's lifetime, the share of the deceased beneficiary is to be paid to his appointees or to one or more designated alternate takers (other than the grantor or the grantor's estate) whose shares have been irrevocably specified. A power does not fall within the powers described in this paragraph if any person has a power to add to the beneficiary or beneficiaries or to a class of beneficiaries designated to receive the income or corpus except where such action is to provide for after-born or after-adopted children.

(7) Power to withhold income during disability of a beneficiary. – A power exercisable only during –

(A) the existence of a legal disability of any current income beneficiary, or

(B) the period during which any income beneficiary shall be under the age of 21 years,

to distribute or apply income to or for such beneficiary or to accumulate and add the income to corpus. A power does not fall within the powers described in this paragraph if any person has a power to add to the beneficiary or beneficiaries or to a class of beneficiaries designated to receive the income or corpus, except where such action is to provide for after-born or after-adopted children.

(8) Power to allocate between corpus and income. – A power to allocate receipts and disbursements as between corpus and income, even though expressed in broad language.

(c) Exception for certain powers of independent trustees. – Subsection (a) shall not apply to a power solely exercisable (without the approval or consent of any other person) by a trustee or trustees, none of whom is the grantor, and no more than half of whom are related or subordinate parties who are subservient to the wishes of the grantor –

(1) to distribute, apportion, or accumulate income to or for a beneficiary or beneficiaries, or to, for, or within a class of beneficiaries; or

(2) to pay out corpus to or for a beneficiary or beneficiaries or to or for a class of beneficiaries (whether or not income beneficiaries).

A power does not fall within the powers described in this subsection if any person has a power to add to the beneficiary or beneficiaries or to a class of beneficiaries designated to receive the income or corpus, except where such action is to provide for after-born or after-adopted children. For periods during which an individual is the spouse of the grantor (within the meaning of section 672(e)(2)), any reference in the subsection to the grantor

shall be treated as including a reference to such individual.

(d) Power to allocate income if limited by a standard. – Subsection (a) shall not apply to a power solely exercisable (without the approval or consent of any other person) by a trustee or trustees, none of whom is the grantor or spouse living with the grantor, to distribute, apportion, or accumulate income to or for a beneficiary or beneficiaries, or to, for, or within a class of beneficiaries, whether or not the conditions of paragraph (6) or (7) of subsection (b) are satisfied, if such power is limited by a reasonably definite external standard which is set forth in the trust instrument. A power does not fall within the powers described in this subsection if any person has a power to add to the beneficiary or beneficiaries or to a class of beneficiaries designated to receive the income or corpus except where such action is to provide for after-born or after-adopted children.

26 U.S.C. Section 675

§ 675. Administrative powers

The grantor shall be treated as the owner of any portion of a trust in respect of which –

> **(1) Power to deal for less than adequate and full consideration.** – A power exercisable by the grantor or a nonadverse party, or both, without the approval or consent of any adverse party enables the grantor or any person to purchase, exchange, or otherwise deal with or dispose of the corpus or the income therefrom for less than an adequate consideration in money or money's worth.

> **(2) Power to borrow without adequate interest or security.** – A power exercisable by the grantor or a nonadverse party, or both, enables the grantor to borrow the corpus or income, directly or indirectly, without adequate interest or without adequate security except where a trustee (other than the grantor) is authorized under a general lending power to make loans to any person without regard to interest or security.
>
> **(3) Borrowing of the trust funds.** – The grantor has directly or indirectly borrowed the corpus or income and has not completely repaid the loan, including any interest, before the beginning of the taxable year. The preceding sentence shall not apply to a loan which provides for adequate interest and adequate security, if such loan is made by a trustee other than the grantor and other than a related or subordinate trustee subservient to the grantor. For periods during which an individual is the spouse of the grantor (within the meaning of section 672(e)(2)), any reference in this paragraph to the grantor shall be treated as including a reference to such individual.
>
> **(4) General powers of administration.** – A power of administration is exercisable in a nonfiduciary capacity by any person without the approval or consent of any person in a fiduciary capacity. For purposes of this paragraph, the term "power of administration" means any one or more of the following powers: (A) a power to vote or direct the voting of stock or other securities of a corporation in which the holdings of the grantor and the trust are significant from the viewpoint of voting control; (B) a power to control the investment of the trust funds either by directing investments or reinvestments, or by vetoing proposed investments or reinvestments, to the extent that the trust funds consist of

stocks or securities of corporations in which the holdings of the grantor and the trust are significant from the viewpoint of voting control; or (C) a power to reacquire the trust corpus by substituting other property of an equivalent value.

26 U.S.C. Section 676

§ 676. **Power to revoke**

(a) General rule. – The grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under any other provision of this part, where at any time the power to revest in the grantor title to such portion is exercisable by the grantor or a non-adverse party, or both.

(b) Power affecting beneficial enjoyment only after occurrence of event. – Subsection (a) shall not apply to a power the exercise of which can only affect the beneficial enjoyment of the income for a period commencing after the occurrence of an event such that a grantor would not be treated as the owner under section 673 if the power were a reversionary interest. But the grantor may be treated as the owner after the occurrence of such event unless the power is relinquished.

26 U.S.C. Section 677

§ 677. **Income for benefit of grantor**

(a) General rule. – The grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under section 674, whose income without the approval or consent of any adverse party is,

or, in the discretion of the grantor or a nonadverse party, or both, may be –

(1) distributed to the grantor or the grantor's spouse;

(2) held or accumulated for future distribution to the grantor or the grantor's spouse; or

(3) applied to the payment of premiums on policies of insurance on the life of the grantor or the grantor's spouse (except policies of insurance irrevocably payable for a purpose specified in section 170(c) (relating to definition of charitable contributions)).

This subsection shall not apply to a power the exercise of which can only affect the beneficial enjoyment of the income for a period commencing after the occurrence of an event such that the grantor would not be treated as the owner under section 673 if the power were a reversionary interest; but the grantor may be treated as the owner after the occurrence of the event unless the power is relinquished.

(b) Obligations of support. – Income of a trust shall not be considered taxable to the grantor under subsection (a) or any other provision of this chapter merely because such income in the discretion of another person, the trustee, or the grantor acting as trustee or co-trustee, may be applied or distributed for the support or maintenance of a beneficiary (other than the grantor's spouse) whom the grantor is legally obligated to support or maintain, except to the extent that such income is so applied or distributed. In cases where the amounts so applied or distributed are paid out of corpus or out of other than income for the taxable year, such amounts

shall be considered to be an amount paid or credited within the meaning of paragraph (2) of section 661 (a) and shall be taxed to the grantor under section 662.

26 U.S.C. Section 678

§ 678. Person other than grantor treated as substantial owner

(a) General rule. – A person other than the grantor shall be treated as the owner of any portion of a trust with respect to which:

(1) such person has a power exercisable solely by himself to vest the corpus or the income therefrom in himself, or

(2) such person has previously partially released or otherwise modified such a power and after the release or modification retains such control as would, within the principles of sections 671 to 677, inclusive, subject a grantor of a trust to treatment as the owner thereof.

26 U.S.C. Section 679

§ 679. Foreign trusts having one or more United States beneficiaries

(a) Transferor treated as owner. –

(1) In general. – A United States person who directly or indirectly transfers property to a foreign trust (other than a trust described in section 404(a)(4) Or section 404A) shall be treated as the owner for his taxable year of the portion of such trust attributable to such property if for such year there is a United States beneficiary of any portion of such trust.

(2) Exceptions. – Paragraph (1) shall not apply –

(A) Transfers by reason of death. – To any transfer by reason of the death of the transferor.

(B) Transfers where gain is recognized to transferor. – To any sale or exchange of the property at its fair market value in a transaction in which all of the gain to the transferor is realized at the time of the transfer and is recognized either at such time or is returned as provided in section 453.

(b) Trusts acquiring United States beneficiaries. – If –

(1) subsection (a) applies to a trust for the transferor's taxable year, and

(2) subsection (a) would have applied to the trust for his immediately preceding taxable year but for the fact that for such preceding taxable year there was no United States beneficiary for any portion of the trust,

then, for purposes of this subtitle, the transferor shall be treated as having income for the taxable year (in addition to his other income for such year) equal to the undistributed net income (at the close of such immediately preceding taxable year) attributable to the portion of the trust referred to in subsection (a).

(c) Trusts treated as having a United States beneficiary. –

(1) In general. – For purposes of this section, a trust shall be treated as having a United States beneficiary for the taxable year unless –

(A) under the terms of the trust, no part of the income or corpus of the trust may be paid or accumulated during the taxable year to or for the benefit of a United States person, and

(B) if the trust were terminated at any time during the taxable year, no part of the income or corpus of such trust could be paid to or for the benefit of a United States person.

(2) Attribution of ownership. – For purposes of paragraph (1), an amount shall be treated as paid or accumulated to or for the benefit of a United States person if such amount is paid to or accumulated for a foreign corporation, foreign partnership, or foreign trust or estate, and –

(A) in the case of a foreign corporation, more than 50 percent of the total combined voting power of all classes of stock entitled to vote of such corporation is owned (within the meaning of section 958(a)) or is considered to be owned (within the meaning of section 958(b)) by United States shareholders (as defined in section 951(b)),

(B) in the case of a foreign partnership, a United States person is a partner of such partnership, or

(C) in the case of a foreign trust or estate, such trust or estate has a United States beneficiary (within the meaning of paragraph (1)).

26 U.S.C. Section 6012

§ 6012. **Persons required to make returns of income**

(a) General rule. – Returns with respect to income taxes under subtitle A shall be made by the following:

* * *

(b) Returns made by fiduciaries and receivers. –

(1) Returns of decedents. – If an individual is deceased, the return of such individual required under subsection (a) shall be made by his executor, administrator, or other person charged with the property of such decedent.

(2) Persons under a disability. – If an individual is unable to make a return required under subsection (a), the return of such individual shall be made by a duly authorized agent, his committee, guardian, fiduciary or other person charged with the care of the person or property of such individual. The preceding sentence shall not apply in the case of a receiver appointed by authority of law in possession of only a part of the property of an individual.

(3) Receivers, trustees and assignees for corporations. – In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

(4) Returns of estates and trusts. – Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

(5) Joint fiduciaries. – Under such regulations as the Secretary may prescribe, a return made by one of two or more joint fiduciaries shall be sufficient compliance with the requirements of this section. A return made pursuant to this paragraph shall contain a statement that the fiduciary has sufficient knowledge of the affairs of the person for whom the return is made to enable him to make the return, and that the return is, to the best of his knowledge and belief, true and correct.

26 U.S.C. Section 6151

§ 6151. Time and place for paying tax shown on returns

(a) General rule. – Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

(b) Exceptions. –

(1) Income tax not computed by taxpayer. – If the taxpayer elects under section 6014 not to show the tax on the return, the amount determined by the Secretary as payable shall be paid

within 30 days after the mailing by the Secretary to the taxpayer of a notice stating such amount and making demand therefor.

(2) Use of government depositaries. – For authority of the Secretary to require payments to Government depositaries, see section 6302(c).

(c) Date fixed for payment of tax. – In any case in which a tax is required to be paid on or before a certain date, or within a certain period, any reference in this title to the date fixed for payment of such tax shall be deemed a reference to the last day fixed for such payment (determined without regard to any extension of time for paying the tax).

Supreme Court Rule 10

Rule 10. Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

28 U.S.C. Section 960

§ 960. **Tax liability**

Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

31 U.S.C. Section 3713

§ 3713. **Priority of Government claims**

(a)(1) A claim of the United States Government shall be paid first when –

(A) a person indebted to the Government is insolvent and –

(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached; or

(iii) an act of bankruptcy is committed; or

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

(2) This subsection does not apply to a case under title 11.

*　*　*

(4)

NO. 90-1484

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

UNITED STATES OF AMERICA,

Petitioner,

v.

FRED STANTON SMITH, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT SHUTTS & BOWEN ON PETITION FOR WRIT OF CERTIORARI

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April 1991

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Respondent Shutts & Bowen was an intervenor in the courts below. In this capacity Shutts & Bowen took no position on the merits of the respective arguments advanced by the parties. Rather it argued that its

fee award had priority over the tax claim as a matter of law, and as a result, the stay prohibiting the liquidating trustee from disbursing any funds from the trust should be lifted as to Shutts & Bowen's claim.

None of the lower courts reached this question as each held the trustee not responsible for the payment of taxes. This Court, by order dated January 22, 1991, refused to continue the stay pending the outcome of these proceedings, and, thus, Shutts & Bowen's argument has become moot.

Respectfully submitted,

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April 1991 Shutts & Bowen

(4) (5)

Nos. 90-1361, 90-1484

In The

Supreme Court of the United States

October Term, 1990

HOLYWELL CORPORATION, ET AL.,

Petitioners,

vs.

FRED STANTON SMITH, LIQUIDATING TRUSTEE, ET AL.,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

vs.

FRED STANTON SMITH, LIQUIDATING TRUSTEE, HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, THEODORE B. GOULD, and THE BANK OF NEW YORK,

Respondents.

Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

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April 1991

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QUESTION PRESENTED

Whether a liquidating trustee, appointed pursuant to a confirmed plan of reorganization in five consolidated bankruptcy cases, is obligated to ascertain and pay income taxes on behalf of the debtors when (a) no such tax liabilities were scheduled by the debtors, (b) the confirmed plan made no provision for any such taxes, (c) the Internal Revenue Service filed no objection to the plan, (d) the Internal Revenue Service filed no proof of claim with respect to any such taxes, (e) the Internal Revenue Service never proved that any tax was or is payable, (f) the liquidating trustee acted merely as a disbursing agent exercising ministerial authority, and not as a receiver, and (g) the discharged debtors remained in existence and in possession of their books and records?

ENTITIES RELATED TO RESPONDENT, THE BANK OF NEW YORK

BNY Holdings (Delaware) Corporation

The Bank of New York (Delaware)

The Bank of New York Overseas Finance, N.C.

Affinity Group Marketing, Inc.

ARCS Mortgage Corp. (Fla.)

ARCS Mortgage, Inc. (Calif.)

BNY Leasing, Inc.

Eastern Trust Company

The Bank of New York Life Insurance Co., Inc.

Capital Trust Company

BNY Financial Corporation

BNY Personal Brokerage, Inc.

Beacon Capital Management

The Bank of New York Trust Company, Inc.

The Bank of New York Trust Company of California

The Bank of New York Trust Company of Florida, N.A.

Leonard Newman Agency, L.P.

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INTRODUCTION

Respondent, The Bank of New York (the "Bank"), respectfully opposes the petitions for certiorari filed and served by five debtors in Chapter 11 cases (Case No. 90-1361) and by the United States of America on behalf of the Internal Revenue Service ("IRS"; Case No. 90-1484). The Bank was granted leave to file this consolidated brief in opposition to both petitions.

Three courts below have reached the identical result based on detailed findings of fact. This Court does not grant certiorari to review evidence, and the petitions should therefore be denied.

STATEMENT

A. Statement by the Debtors

The statement by the debtor/petitioners in Case No. 90-1361 is incomplete and inaccurate.[1]

1. Procedural Matters

This petition is the ninth – and apparently not the last – such petition filed by these debtors over the past three years.[2] One such petition (Case No. 87-1988) sought review of the court of appeals' dismissal as moot of the debtors' appeal from the confirmation of the plan of reorganization (the "Plan") proposed by the Bank and overwhelmingly approved by the 400-plus creditors in

[1] This is unintentional, no doubt, and a natural result of the fact that the counsel for the petitioners in this Court are the fifth firm of lawyers to represent the debtors; these counsel did not represent the debtors at trial, in the appeal to the district court, or in the briefing and oral argument in the court of appeals before that court's September, 1990 opinion. Relief pitching in the late innings is difficult work.

[2] The prior petitions were in Cases No. 87-1988, 87-1989, 88-80, 89-708, 89-864, 89-917, 90-676, and 90-761; each was denied.

1985. This Court denied further review, so the legal sufficiency of the Plan and the propriety of the confirmation order are not now subject to further challenge.[3]

The court of appeals denied a further stay of the opinion regarding income taxes now sought to be reviewed, denied rehearing, and denied rehearing en banc; neither the circuit judge who issued a dissenting opinion nor any other judge of the circuit voted for rehearing (App. 41a).[4]

Undaunted, the debtors sought a further stay here (Application No. A-546), which was promptly denied by Justice Kennedy.[5]

2. The Facts

The disposition of this case below is based upon an extraordinary record. The debtors, recognizing that "this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts",[6] have omitted the salient facts:

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[3] *In re Holywell Corp.*, 54 Bankr. 41 (Bankr. S.D. Fla. 1985), *aff'd*, 59 Bankr. 340 (S.D. Fla. 1986), *appeal dismissed*, 838 F.2d 1547 (11th Cir. 1988), *cert. denied*, 488 U.S. 823 (1988).

[4] References to the debtors' appendix are by "App. ___a"; the Bank's appendix is referred to by "Bank App. B-___"; and the Liquidating Trustee's appendix is referred to by "Liq. Tr. App. ___a".

[5] Liq. Tr. App. 15a. The denial of a stay application in a civil case is appropriate if the Court concludes that it is not likely that four Justices are likely to grant certiorari. *Coleman v. Paccar*, 424 U.S. 1301, 1302 (1976); *Edelman v. Jordan*, 414 U.S. 1301 (1973).

[6] *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). This rule is even more compelling where, as here, issues of fact have been found and reviewed at three (bankruptcy court, district court, and court of appeals) levels rather than two levels before submission to this Court.

(a) Neither the plans of reorganization proposed by the debtors nor the Plan proposed by the Bank made any provision for the payment of income taxes (App. 29a), and each was served upon the IRS. The IRS never objected to either and has not demonstrated to this day that any tax is due. The Bank's Plan was confirmed by the creditors and the bankruptcy court, while the debtors' proposed plans were rejected by the creditors and the court.

(b) In 1985, before confirmation of the Bank's Plan, the debtors objected to the Plan because it did not provide for payment of taxes on any gain realized by the debtors from the post-petition (but pre-confirmation) sale of three properties (the "Washington Properties"). The bankruptcy court advised the debtors in open court that the debtors had failed to introduce any evidence of adverse tax consequences. The bankruptcy court invited the debtors to introduce such evidence and seek a modification of the Plan [Bank App. B-49], but the debtors never did.

(c) In reliance upon the order of confirmation and without knowledge of a legal challenge or income tax claim by the IRS, the Bank and the Liquidating Trustee substantially consummated the Plan on October 10, 1985. As part of that reliance, and as provided by the Plan, the Bank (i) permitted the release of over $30 million of its cash collateral to the Liquidating Trustee so that other creditors could be paid, and (ii) advanced over $13.6 million in new cash as part of the purchase price for the Miami Center Project. In further reliance on the silence of the debtors and the IRS as to income taxes, the Liquidating Trustee made payments in full to some 400 creditors. *Holywell, supra*, 838 F.2d at 1550.

(d) The debtors pursued an appeal from the confirmation order, but the district court affirmed. The court of appeals and this Court denied further review. The IRS, however, never appealed the order confirming the Plan and never sought a stay of the consummation of the Plan.

(e) Contrary to its own standard Internal Revenue Manual ("IRM") procedures,[7] the IRS made no investigation and filed no proof of claim with respect to any alleged tax liability.[8]

(f) In 1986 and 1987, well after confirmation and substantial consummation of the Plan (and well after the allegedly-taxable real estate transactions), the debtors and their outside, "Big Eight", accountants took the position in writing that the Liquidating Trustee of the Miami Center Liquidating Trust was not required to file returns or pay income taxes with respect to the debtors' income.[9] When they decided that it would be more advantageous to them to try to foist off any tax liability on the creditors rather than to file a return and pay the taxes, the debtors changed position.

(g) Neither the debtors nor the IRS proved at trial what income taxes, if any, are owed. At trial, the IRS and the debtors made no record on this point. The estimates of taxable income recited by the debtors at page 6 and footnote 5 of their petition are not part of the proof below. The IRS documents referred to by the debtors (1) were never part of the record at trial,[10] (2) are disputed by the

[7] IRM 57(13); pertinent excerpts are attached as Bank's App. B-1 through B-32.

[8] These omissions are detailed in the lower court opinions at App. 8a (court of appeals), 21a-22a (district court), and 30a (bankruptcy court).

[9] Trial exhibits 2, 3, and 4; attached as Bank's App. B-33, B-35, and B-38.

[10] The debtors mislead the Court in footnote 5 at page 6 of their petition. The IRS reports referred to there were not a part of the trial record. They were filed with the court of appeals (by Mr. Gould, *pro se*), without any leave to amend the record. The documents have not been authenticated by an IRS witness, nor have they been the subject of cross-examination by any party. They related to a partnership (debtor Miami Center

(Continued on following page)

debtors themselves,[11] and (3) lack the other elements (deductions, adjustments, credits, loss carryforwards, and other values that affect the computation of income tax actually owed) necessary to permit the assessment of a specific dollar amount of taxes for a particular debtor for a particular tax year. "A tax cannot be found 'legally due and owing' by the debtor until enough is known of its basis to make the tax computable or knowable, when all facts necessary for its calculation are knowable".[12] The IRS never took discovery or engaged in any other effort in these cases to fix a specific amount of tax liability.

(h) The debtors doggedly characterize the Liquidating Trustee as a "trustee" having "a full panoply of powers". In reality, however, the Liquidating Trustee and Miami Center Liquidating Trust were created by the terms of the Plan as a mechanism for the liquidation and disbursement of allowed claims as defined in the Plan. A

(Continued from previous page)

Limited Partnership, or "MCLP") which is not itself a taxpayer under any scenario (partnerships are conduits and do not pay taxes; each partner reports and pays taxes on his or her percentage of the partnership's gain, loss, credit, etc.). And, above all, they do not show any amount of tax to be payable by any debtor for any year.

[11] The debtors are caught in a poignant dilemma. If certiorari is denied, they will be responsible for any taxes in accordance with the three opinions below. Thus, the Court will not find the debtors conceding that any specific sum of tax is due. However, if no specific sum of tax is due, there is no basis or need for further review by this Court. In an effort to keep one leg on each of these rapidly diverging horses, the debtors refer to six or seven multi-million dollar figures that relate to particular line items of a tax return (gain and loss, for example) but not to any ultimate sum of tax purportedly payable. One needs all the line items of a return, and not just one or two of the line items, to know whether any tax is payable.

[12] *In re Childress*, 59 Bankr. 828, 830 (Bankr. N.D. Ill. 1986).

Bankruptcy Code "trustee" connotes a Court-appointed officer with all of the authority, discretion, and power described in Title 11, United States Code. The Plan in this case confers no such statutory powers on the Liquidating Trustee. The bankruptcy court found as a matter of fact that the Liquidating Trustee's duties were merely, "to pay the debtors' indebtedness in a manner specified by the plan" (App. 32a). Similarly, the district court found that the Plan assigned to the Liquidating Trustee certain "limited and essentially ministerial functions" (App. 24a). The court of appeals reached the same conclusion (App. 11a). The record below shows that the Liquidating Trustee has not operated a business or exercised any discretion.[13] Instead, the record supports the findings of fact below that the Liquidating Trustee's functions were limited and ministerial.

B. Statement by the IRS

1. Procedural Matters

The petition of the Solicitor General on behalf of the IRS urges the Court to overlook the IRS's departures from well-settled procedural requirements in bankruptcy. Having lost on the facts in the three courts that have considered the matter, the IRS now asks this Court for a special dispensation from those procedural requirements.

Although the IRS received the petitions in bankruptcy in 1984 and the plans, disclosure statements, and confirmation order approving the Bank's Plan in 1985, the Liquidating Trustee's adversary proceeding in late 1987 was the first time that any potential tax liability of the Liquidating Trust was raised. Until that proceeding, the IRS had done nothing with respect to the matter. The district court detailed the IRS's procedural omissions:

[13] For example, the settlement of any disputed claim has always been brought to the bankruptcy court for review and approval.

**The IRS filed no objections to the Plan or disclosure statement [App. 18a].

**The IRS did not appeal the confirmation of the Plan [App. 19a].

**The IRS failed to file any proof of claim for any such income taxes in the manner, and within the time, specified by the Bankruptcy Code, the Plan, and the bankruptcy court. [App. 32a].[14]

2. The Facts

The IRS's petition relegates to footnotes the very facts that were the gravamen of the three decisions below.

Footnote 2, page 4 of the IRS petition concedes that, "the government filed no objection to the confirmation of the plan and did not participate in the appeals of the confirmation order". The footnote omits to disclose the equally-inexplicable failure of the IRS to file a proof of claim with respect to the allegedly-due taxes.

Footnote 4, page 6 of the IRS petition concedes that:

> No determination of the tax liability of any party had then been made by the IRS with respect to such gains and investment income, although the taxes would evidently be substantial.

The footnote omits to report that no determination of tax liability has ever been made by the IRS for the

[14] This lapse by the IRS continues to this day. The IRS's failure to file a timely proof of claim and to follow its own Internal Revenue Manual ("IRM") procedures also resulted in the loss of a $3.2 million pre-petition tax claim in these cases. *In re Holywell Corp.*, 68 Bankr. 203 (Bankr. S.D. Fla. 1986), *aff'd* in *United States v. Holywell Corp.*, Case No. 87-0968-Civ-Davis (S.D. Fla. 1987) (unreported opinion attached at App. B-40). The United States wisely dismissed its appeal to the court of appeals in that case, but has for some reason chosen to persist with the equally-fatal facts of the petition here.

debtors. Speculation that the taxes would "evidently be substantial" is the IRS's way of admitting that it still has no idea, seven years after the bankruptcies began, what amount of taxes might be due for the two corporate and one individual debtor/taxpayers.

Further, the IRS has never proven that the debtors will be unable to pay any such liability (if and when the IRS establishes any such liability). The IRS's concern for the public fisc must be viewed in light of the IRS's failure to assess any taxes against the debtors.

SUMMARY OF ARGUMENT

Petitioners attempt to portray the issue in this case as one of critical importance to the Internal Revenue Service's ability to safeguard the public fisc. That simply is not true. *No one disputes that the IRS had a full opportunity to protect its interest in tax collection by presenting to the bankruptcy court its contention that taxes should be paid out of the assets placed in the Liquidating Trust.* Indeed, Section 1129(d) of the Bankruptcy Code, 11 U.S.C. § 1129(d), specifically authorizes a governmental unit to object to a reorganization plan on tax avoidance grounds. If the IRS's interest could be protected only by payment of taxes out of the assets in question, the bankruptcy court could have refused to approve the reorganization plan unless it was modified to include such a provision. Significantly, the IRS's own administrative manual requires the Service to monitor filings in Chapter 11 cases and ensure that proposed reorganization plans adequately protect the government's interest.

In fact, of course, neither the IRS nor the debtor ever raised the issue before the bankruptcy court. Although both parties were fully aware of the contours of the proposed reorganization plan, neither pressed an objection to the plan on the ground that it did not sufficiently protect the IRS's interest. After the plan was approved, the Liquidating Trustee began to disburse the trust's assets to creditors in accordance with the reorganization

plan, which contemplates payment of all claims in full. In addition, some creditors released their claims to certain of the debtors' assets.

What this case is really about, therefore, is whether the IRS is entitled to multiple bites at the tax collection apple. Having remained silent at the time the reorganization plan was being formulated, and now faced with the decisions of three courts holding that it does not have the right to assert a claim under the Plan, the IRS attempts to rely on statutory authority independent of the Plan to impose upon the Liquidating Trustee tax obligations that are outside the scope of his authority. That result could, of course, require the few remaining unpaid creditors to shoulder the entire tax liability, if any is found to exist, with the result that they might have to accept much less than the full payment received by other creditors and contemplated by the reorganization plan. Had the creditors been aware of the possibility that the payments contemplated by the Plan would not take place as a result of the diversion of some of the trust's assets to the IRS, it is difficult to believe that the Plan would have been approved.

Nothing in the statutory provisions cited by petitioners mandates that result. These provisions require that returns be filed by *statutory* bankruptcy trustees or others exercising similarly broad authority over the debtor's assets. The three courts below correctly found that the "essentially ministerial function" performed by the Liquidating Trustee does not satisfy that test.

Petitioners' entire argument reduces to the assertion that, because *other* types of trustees must file returns and pay taxes, the Liquidating Trustee must do so as well. But the line drawn by the court of appeals is entirely rational and rests squarely on the particular factual findings in this case: it would be inequitable to require an individual or entity to file returns and pay taxes where that individual or entity lacks authority to do so under a reorganization plan sanctioned by the bankruptcy court. The result

urged by petitioners would require the Liquidating Trustee to violate the terms of the trust agreement and would upset the expectations of the parties to the bankruptcy proceeding.

Not only that, the distinction drawn by the court of appeals accords with established precedent. Petitioners have not pointed to a single case in which an individual or entity exercising the limited authority of the Liquidating Trustee has been required to file returns. Rather, all of their cases involve statutory trustees or others exercising broad authority. The court of appeals – which was well aware of the cases relied on by petitioners here – properly concluded that a different result was appropriate because of the different facts of this case. No other court of appeals has even addressed the question, let alone reached a contrary conclusion.

The question presented in this case, therefore, is whether the court of appeals – in what is apparently the first appellate decision to address the question – erred in concluding that Section 6012(b) does not apply to ministerial functionaries like the Liquidating Trustee. In view of the unique factual circumstances of this case – on which the court of appeals expressly grounded its decision, the absence of a conflict among the lower courts, and the wholly speculative nature of petitioners' claims regarding the practical importance of the issue presented for review, the petitions for a writ of certiorari should be denied.

ARGUMENT

THE PETITIONS FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

A. The IRS Failed In This Case To Avail Itself Of The Well-Established Bankruptcy Court Procedures That Enable The IRS To Safeguard The Public Fisc.

In order to evaluate the legal merits – and the asserted practical importance – of the question presented

in the certiorari petitions, it is necessary to understand the relevant background, both the pertinent provisions of the Bankruptcy Code and the events in this case. That background makes clear that conventional bankruptcy procedures grant to the IRS undisputed authority to ensure the payment of any and all taxes that might be due. Because the IRS repeatedly failed to avail itself of those procedures in this case, it seeks here to supplement its authority in a manner not contemplated by Congress.

Chapter 11 of the Bankruptcy Code allows a debtor to reorganize his business by, for example, restructuring his debt, and emerge from bankruptcy as an ongoing concern. Upon the filing of a bankruptcy petition under Chapter 11, the debtor may retain control of his assets or the court may appoint a "trustee" to take control of those assets. 11 U.S.C. § 1104(a). The trustee, or the "debtor in possession" in the event no trustee is appointed (*see* 11 U.S.C. § 1107), has broad statutory authority to operate the debtor's business (*id.* § 1108); affirm, reject, or assign executory contracts (*id.* § 365); avoid voidable transfers of property (*id.* § 544); avoid certain statutory liens (*id.* § 545); avoid fraudulent conveyances (*id.* § 548); recover preferences (*id.* § 547); avoid certain postpetition transfers (*id.* § 549); recover certain offsets by creditors (*id.* § 553); and abandon property of the bankruptcy estate (*id.* § 554).

The focus of the Chapter 11 process is the reorganization plan. The plan specifies the treatment of the debtor's various obligations (*e.g.*, whether a particular debt will be paid in full or discharged in whole or in part) as well as the allocation of the debtor's assets. *See generally* 11 U.S.C. § 1123. The creditors have an important role in approving a plan. As a general matter, a plan that impairs the interests of a class of creditors may not be confirmed unless the plan is endorsed by that class of creditors. *See id.* § 1129.[15]

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[15] There are limited exceptions to this principle. *See* 11 U.S.C. § 1129.

In this case, both the debtors (who were debtors in possession because no statutory trustee was appointed by the bankruptcy court) and one of the creditors – The Bank of New York – proposed reorganization plans. Neither the debtors' plans nor the Bank's Plan made provision for the payment of taxes and neither disclosure statement (a document filed by the proponent of a plan that explains the terms of the plan (*see* 11 U.S.C. § 1125)) made provision for payment of taxes. App. 30a. The Bank's Plan "create[d] a trust and require[d] that a Liquidating Trustee be appointed whose responsibilities include the identification and payment of all valid claims against the estate with the payment of the sum remaining to the debtors." *Ibid*. The corpus of the trust was to be the assets of the debtors' bankruptcy estates.

As the bankruptcy court explained, "[t]he Liquidating Trustee's duties and powers under the plan are limited. The Liquidating Trustee does not possess discretionary authority as to the disposition of plan's assets. The Liquidating Trustee is merely charged with the responsibility of identifying, quantifying and paying allowed claims through the disbursement of trust assets in accordance with the terms of the confirmed plan." App. 32a-33a. The Plan specified the precise manner in which the trustee was to reduce the assets to cash and the order in which the claims were to be paid (the accompanying disclosure statement described the particular amounts of the claims in each category). *See* Bank App. B-52 to B-56 to this brief (excerpts from reorganization plan).[16] The court of appeals and the district court properly characterized the Liquidating Trustee's duties as "limited and essentially ministerial functions." App. 24a; *accord, id.* at 11a-12a.

Both the debtors' reorganization plans and the Bank's Plan – together with the accompanying disclosure statements – were served on the interested parties, including

[16] Amounts were not specified for claims still in litigation.

the Internal Revenue Service. The IRS did not object to either plan on the ground that it failed to provide for filing of returns and payment of taxes by the Liquidating Trustee. App. 18a-19a. (The debtors similiarly failed to press an objection. *See* p. 3, *supra*.) As the bankruptcy court observed, the IRS

> was involved in other tax disputes with the debtors and had notice of the bankruptcy proceedings. The government received copies of the competing plans and disclosure statements; had an opportunity to object and be heard on the terms proposed in the plans; and to appeal from the order of confirmation which contained no provision for payment of capital gains taxes. The government did none of these things.

App. 30a; *see also id.* at 18a-19a ("[t]he IRS filed no objections to either the disclosure statement or the plans").[17]

The IRS plainly could have raised the taxation issue prior to confirmation of the plan. It could have objected as a party in interest (*see* 11 U.S.C. § 1128(b)) or on the ground that the principal purpose of the plan was to avoid taxes (*id.* § 1129(d)). If the IRS had objected

[17] The IRS has a specific group of employees, the Special Procedures Function ("SPF"), whose job is to ensure that the IRS is protected in bankruptcy cases. The Internal Revenue Manual prescribes detailed guidelines that these employees are enjoined to follow in order to make certain that the IRS's interest in tax collection is protected under reorganization plans proposed in Chapter 11 cases. (Pertinent excerpts from the manual are attached as Appendix B-1 to B-32.) IRM 57(13) 5.3(4)(a) provides that "SPF should review the Plan to ensure that the government's claim is treated as required by the Bankruptcy Code," and that the SPF employee should refer the case to the Service's District Counsel if the plan "does not provide for all administrative taxes to be paid in full, in cash, upon the effective date of the Plan," or if the plan "appears, in any way, to jeopardize the government's interest."

at that time, the bankruptcy court – and the other creditors as well – would have been able to consider the issue prior to confirmation of the Plan and evaluate the impact of the IRS's contention on repayment of other creditors as well as the reorganized debtors' ability to pay any taxes that might be due.[18]

The Bank of New York plan eventually was confirmed by the creditors and the bankruptcy court. That determination was upheld by the district court, the Eleventh Circuit dismissed the debtors' appeal as moot, and this Court denied review. *Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), *dismissed as moot*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988). Pursuant to the terms of the Plan, the Liquidating Trustee has paid the claims of over 400 creditors, amounting to many millions of dollars. Several other claims remain unpaid. In addition, in reliance on the effectiveness of the

[18] A recurring theme of the certiorari petitions is that the court of appeals' decision will burden the reorganized debtors with potential tax liability and therefore undercuts the "fresh start" policy embodied in the bankruptcy laws. To begin with, there is nothing unusual about a Chapter 11 Plan that imposes upon the reorganized business some continuing obligation to pay off creditors. 5 *Collier Bankruptcy Practice Guide* ¶90.06[4] (1991) (discussing deferred payments). This is especially true with respect to tax liabilities. *See* 11 U.S.C. § 523(a)(1) (continuing obligations of individual debtors after discharge). Second, as we have discussed (*see* pages 4-5, *supra*), there is absolutely nothing in the record that makes possible calculation of this supposed tax burden and it is possible that the actual liability will be negligible. Moreover, the reorganization plan contemplates that the debtors will receive assets from the Liquidating Trust and it is certainly possible that those assets will cover any tax liability that might be found to be due. Finally, the debtors' newly-found concern about potential tax burdens rings quite hollow in light of the fact that the debtors previously took the position that the Liquidating Trustee was *not* obligated to file returns and pay taxes. *See* page 4, *supra*.

Plan, the Bank has advanced $13.6 million to the Liquidating Trustee and released $30 million in cash collateral, to the detriment of the Bank and the benefit of other creditors.

The IRS and the debtors argued vigorously in the courts below that the reorganization plan itself requires the Liquidating Trustee to file the returns and pay any taxes that are due. Each of the lower courts squarely rejected that argument, holding that these claims are not within the scope of the Plan. App. 7a-10a, 21a-23a, 29a-30a. Petitioners do not seek review of that determination. As the case comes to this Court, therefore, it has been conclusively determined that the reorganization plan bars the Liquidating Trustee from filing the returns and paying the taxes.

Petitioners assert that, despite their failure to press this issue prior to confirmation of the Plan, despite the absence from the reorganization plan of any authority for filing of returns or payment of taxes, and despite the fact that – as a result of the effectiveness of the Plan – the bulk of the creditors have been paid and the Bank has advanced funds and released collateral, they may at this late date impose upon the Liquidating Trustee the obligation to pay certain taxes because federal statutes assertedly require the Liquidating Trustee to perform that function. That argument is inconsistent with fundamental bankruptcy principles.

Courts have repeatedly invoked the mootness doctrine in bankruptcy reorganization cases, dismissing actions as moot where granting the relief sought by the plaintiff (or appellant) would unfairly prejudice persons who relied in good faith on the prior approval of a reorganization plan (*In re National Homeowners Sales Service Corp.*, 554 F.2d 636 (4th Cir. 1977)), or would cast doubt on the validity of completed transactions and "create an unmanageable, uncontrollable situation for the Bankruptcy Court." *In re Roberts Farms, Inc.*, 652 F.2d 793, 797 (9th Cir. 1981). *See also In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984). In this very case, the Eleventh Circuit – in dismissing as moot challenges to the reorganization plan and other efforts to reopen issues

determined by the Plan – repeatedly has upheld the bankruptcy court's determination that "the plan had been substantially consummated and that its fairness, feasibility, and propriety had been verified, and that it had become legally and practically impossible to unwind the consummation of the plan or otherwise to restore the status quo before confirmation." *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547, 1557 (11th Cir. 1988), *cert. denied*, 488 U.S. 823 (1988). *See also* App. 7a, 20a-21a, 36a-37a; *In re Holywell Corp.*, 901 F.2d 931, 933-934 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 713 (1991); *In re Holywell Corp.*, 874 F.2d 780, 782 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 725 (1990).

We recognize that the foregoing cases do not involve obligations assertedly imposed directly by statute. We submit, however, that on the peculiar facts of this case, the same outcome is appropriate. The Bank and other creditors who remain unpaid relied upon the express terms of the reorganization plan in voting to confirm the plan and – in the case of the Bank – investing millions of dollars of new funds, releasing millions of dollars of collateral, and otherwise altering its financial position. It is simply too inequitable for the IRS and the debtors to try to effectuate what is in effect a change in the terms of the reorganization plan, especially in light of the numerous prior opportunities that these parties had to assert their current position. App. 36a ("[t]he payment of the federal taxes would, of necessity, be an impermissible modification of the confirmed plan"). Certainly in view of the unclear nature of any possible statutory obligation (as we discuss below, there is no precedent for the application of Section 6012(b) to a ministerial functionary like the Liquidating Trustee), the IRS and the debtors should not be permitted to retroactively amend the reorganization plan to the detriment of parties who relied on the terms of the Plan.

Moreover, as we now discuss, petitioners' interpretation of the law – rejected by all three of the courts below – is wrong. Indeed, as we demonstrate below (*see* pages 23-25, *infra*), no other court has imposed an obligation to file returns in circumstances like those presented in this case.

B. Section 6012 Does Not Require The Filing Of Returns By The Liquidating Trustee Because The Liquidating Trustee Is Not A Statutory Trustee And Because He Exercises Only "Essentially Ministerial" Powers.

Petitioners argue that federal law requires the Liquidating Trustee to file returns and pay federal taxes on behalf of the debtors. That interpretation of the relevant statutes is wrong.

Petitioners' argument rests principally on Section 6012(b)(3) of the Internal Revenue Code, 26 U.S.C. § 6012(b)(3), which states that where a "receiver, trustee in a case under title 11 of the United States Code, or assignee" has possession of or holds title to all or substantially all the property or business of a corporation, the "receiver, trustee or assignee" must make the income tax return for the corporation. The courts below correctly held that the Liquidating Trustee is not encompassed within the terms of this provision.

To begin with, the Liquidating Trustee is not a "trustee in a case under title 11 of the United States Code" because that phrase – which is a term of art in the bankruptcy context – refers only to the statutory trustees that may be appointed in cases under Chapters 7, 11, 12, and 13 of the Bankruptcy Code. As we have discussed (*see* page 11, *supra*), these trustees are endowed by statute with broad powers over the debtor's estate.[19]

[19] Each chapter of the code tailors the statutory trustee's responsibilities to the ultimate purpose of the particular bankruptcy proceeding. *See, e.g.*, 11 U.S.C. §§ 704, 721 (discussing duties of trustee in Chapter 7 liquidation proceeding). The consistent theme, however, is the unique authority with which the statutory trustee is endowed.

The portions of the Bankruptcy Code describing the powers of these statutory trustees refer to them as "trustee[s] in a case under this title [title 11]." 11 U.S.C. § 321(a) (setting forth eligibility criteria for "trustee in a case under this title"); 11 U.S.C. §§ 322(a) & (b) (qualification requirement that must be met for a person "to serve as trustee in a case under this title"); 323(a) & (b) (providing that "[t]he trustee in a case under this title is the representative of the estate" and that "[t]he trustee in a case under this title has capacity to sue and be sued"); 324(b) (effect of court's removal of "a trustee . . . in a case under this title").

No one would contend that the latter provisions apply to non-statutory trustees who happen to be appointed when a trust is created in the context of a bankruptcy case. Such individuals are not "the representative of the estate" (11 U.S.C. § 323(a)); that role is fulfilled by either the statutory trustee or the debtor in possession. And the statutory selection and qualification criteria do not apply to non-statutory trustees. (Indeed, the criteria set out in Sections 321 and 322 were *not* applied to the Liquidating Trustee in this case.)

Congress's use of the same "trustee in a case under [title 11]" language in Section 6012(b)(3) cannot be dismissed as mere happenstance, especially given the close relationship between Section 6012(b) and the bankruptcy laws. The latter provision plainly was intended to encompass the same limited class as the portions of the Bankruptcy Code discussed above: statutory trustees appointed pursuant to the express provisions of the Bankruptcy Code relating to trustees. *See* App. 11a (distinguishing between trustees under Bankruptcy Code and a "contract trustee"); *accord, In re Sonner,* 53 Bankr. 859, 866 (Bankr. E.D. Va. 1985) (Liquidating Trustee not "trustee" within meaning of Section 6012(b)(3)). Significantly, petitioners have not pointed to a single case

addressing the meaning of "trustee" that reaches a different conclusion.

Similarly, the Liquidating Trustee is not a "receiver" or "assignee" within the meaning of Section 6012(b)(3) or a "fiduciary" within the meaning of Section 6012(b)(4).[20] As the court of appeals concluded, "the Liquidating Trustee's nondiscretionary duties of distributing the trust property in accordance with the Plan makes him similar to a disbursing agent rather than an assignee or fiduciary." App. 11a-12a; *accord, In re Alan Wood Steel Corp.*, 7 Bankr. 697, 700 (E.D. Pa. 1980) ("a disbursing agent is not a receiver, trustee or assignee of the debtor corporation").[21] Indeed, as we discuss below (at pages 23-25), the cases cited by petitioners demonstrate that Section 6012 has been applied only to individuals or entities exercising broad powers approaching those of statutory bankruptcy trustees.

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[20] Section 6012(b)(4), on which the IRS also relies, states that "[r]eturns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof." The IRS contends that the Liquidating Trustee is a fiduciary of the individual debtor.

[21] The IRS tries to distinguish *Alan Wood* on the ground that the court stated that the disbursing agent did not "have possession of or hold title to all or substantially all the business or property of the debtor corporation." 7 Bankr. at 701. But the district court was speaking generically about the nature of the relationship between a disbursing agent and the assets he is charged with distributing. Because the disbursing agent's powers are limited, he cannot be said to either have possession of or hold title to the debtor's property. Indeed, the court had to be making that point because the disbursing agent was in fact in the same position as the Liquidating Trustee here: the debtor's funds were held by the disbursing agent. *See id.* at 699, 701. Thus, *Alan Wood* – the only other case we have located addressing the status under Section 6012 of persons exercising only ministerial authority – reached precisely the same result as the courts below.

The distinction drawn by Congress in excluding trustees who exercise ministerial powers from the reach of Section 6012(b) is entirely rational. To the extent an individual's duties are wholly ministerial and he lacks the discretion to alter prearranged transactions or a prearranged schedule of disbursements, it would be unfair to impose upon that individual the duty to file returns and pay taxes. He would be put to the choice of violating his trust obligation or violating the law. As this Court has indicated in a related context, it would be improper to impose tax obligations on persons unable to exercise control over the allocation of the debtor's assets among creditors. *King v. United States*, 379 U.S. 329, 337-339 (1964); *see also id.* at 433 (White, J., concurring).[22]

As a practical matter, moreover, entities with only limited discretion, like the Liquidating Trustee, do not have access to the records needed to prepare tax returns. Receivers with wide-ranging powers, such as those with

[22] The question in *King* was whether a disbursing agent was personally liable under a predecessor of 31 U.S.C. § 3713(b) for paying another claim prior to a priority claim of the government. The Court recognized that "[w]hether or not [the defendant] falls within the category of fiduciaries on whom such responsibility should be placed depends . . . upon the degree of control he is in a position to assert over the allocation among creditors of the debtor's assets in his possession." 379 U.S. at 337. The Court held that the disbursing agent was subject to the tax obligation because the particular facts of that case indicated that the disbursing agent, who was the former president of the debtor corporation, had "a sufficient degree of control over the allocation among creditors of assets in his possession to give rise to responsibility . . . for seeing that the government priority was paid." *Id.* at 339. *See In re Childress*, 59 Bankr. 828, 832 (Bankr. N.D. Ill.), *aff'd*, 68 Bankr. 742 (N.D. Ill. 1986), *aff'd*, 851 F.2d 926 (7th Cir. 1988) (refusing to hold disbursing agent liable in absence of special facts present in *King*).

authority to wind up the affairs of an entire corporation, are more likely to possess the necessary information. Here, for example, the discharged debtors retained the relevant records and represented that they would file the tax returns. *See* Bank App. B-33-B-38. Even though they have changed their position regarding the filing of returns, the debtors have *refused* to provide the records to the Liquidating Trustee, going so far as to stand in contempt rather than divulge the information. This further supports the conclusion that tax obligations should not be held to extend to an individual or entity with the limited authority of the Liquidating Trustee.[23]

Significantly, the dissenting judge below recognized that the degree of discretion exercised by the Liquidating Trustee is important in determining whether he fits within these provisions. The dissent's contrary view of the proper resolution of this case rested entirely on the conclusion that this particular Liquidating Trustee exercises "broad powers" and therefore cannot be characterized as a disbursing agent. App. 14a-15a. There is no basis for rejecting the well-supported contrary view of the court of appeals (*id.* at 11a-12a), district court (*id.* at 23a-24a), and bankruptcy court (*id.* at 32a-33a) on this fact-bound question.

Those courts properly looked to what the Liquidating Trustee actually was called upon to do by the provisions of the Plan rather than the boilerplate language relating to the trustee's powers to transfer property. The Plan by its express terms eliminates *all* discretion with respect to the trustee's disposition of assets and *all* discretion with

[23] Finally, as the District Court (App. 24a-25a) and the Bankruptcy Court (*id.* at 33a-34a) concluded, the Liquidating Trustee is not liable for taxes under the provisions of the Internal Revenue Code concerning grantor trusts. The Liquidating Trust is a grantor trust under applicable regulations (*see* Treas. Reg. § 1.671-1 and § 1.677(a)-1(d)) and the debtors are therefore responsible for reporting and paying any applicable taxes. *See In re Sonner, supra.*

respect to the trustee's disbursement of the proceeds to creditors. *See* Bank App. B-52 to B-56. Every step that the trustee may take is carefully specified in the Plan itself. Moreover, the facts before the lower courts showed that the Liquidating Trustee has never once exercised discretion in administering the trust. The three courts below correctly concluded that this particular Liquidating Trustee's "essentially ministerial" authority renders Section 6012 inapplicable here.[24]

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[24] The debtors invoke two other statutes, but – not surprisingly given their irrelevance in this case – the IRS does not rely on these statutes and the court of appeals found it unnecessary to respond to the debtors' arguments. It is worth noting, in addition, that even the debtors do not argue that there is a conflict among the lower courts with respect to the meaning of these provisions.

The first provision, 31 U.S.C. § 3713(a), concerning the priority to be accorded government claims, does not by its terms apply to bankruptcy cases and, accordingly, is inapplicable here. *See id.* § 3713(a)(2) ("[t]his subsection does not apply to a case under title 11"). Contrary to the debtors' claim (Pet. 20-21) this creates no anomaly. The Liquidating Trustee is not a "trustee in a case under [title 11]" because that term is limited to statutory trustees. The fact that the reorganization plan is the product of a "case under title 11" in no way undercuts that conclusion. And that result makes perfect sense. The government's priority applies in all contexts other than bankruptcy cases. In the bankruptcy context, the government must press its claims before the bankruptcy court pursuant to applicable bankruptcy principles. The government cannot override the outcome of the bankruptcy proceeding by invoking the priority statute. (*King v. United States*, *supra*, on which the debtors rely, interpreted a prior version of this provision that did not have the exception for bankruptcy cases.)

Section 3713(b), imposing personal liability for failure to pay claims pursuant to Section 3713(a) is inapplicable because there is no Section 3713(a) claim here. In addition, that provision does not apply to disbursing agents exercising only ministerial authority. *See* page 20 & n.22, *supra*.

(Continued on following page)

C. The Decision Below Does Not Conflict With Any Decision Of This Court Or Another Court Of Appeals.

Petitioners argue that the decision below conflicts with numerous decisions of other courts. Of course, this claim of universal conflict is unlikely on its face. And in fact, many of the cases cited by petitioners are irrelevant here because they involve the obligations of statutory bankruptcy trustees. *See Nicholas v. United States*, 384 U.S. 678, 692 (1966); *In re Bentley*, 916 F.2d 431 (8th Cir. 1990); *In re Joplin*, 882 F.2d at 1510; *In re Sapphire S.S. Lines*, 762 F.2d 13 (2d Cir. 1985); *In re I.J. Knight Realty Corp.*, 501 F.2d 62, 63 (3d Cir. 1974); *United States v. Sampsell*, 266 F.2d 631 (9th Cir. 1959). As we have discussed, Section 6012(b) expressly imposes the tax-filing obligation on such trustees but the Liquidating Trustee plainly does not fall within that category.

(Continued from previous page)

The debtors also invoke 28 U.S.C. § 960, but the purpose of that provision is to ensure that persons operating pursuant to judicial decree are not deemed immune from otherwise-applicable tax statutes. *California State Board v. Sierra Summit, Inc.*, 109 S. Ct. 2228, 2234-2235 (1989) (observing that the statute was passed "at the height of the intergovernmental tax immunity doctrine, in response to a Federal District Court decision holding that a bankruptcy receiver" was not subject to state taxation; "[r]ead most naturally, the statute evinces an intention that a State be permitted to tax a bankruptcy estate notwithstanding any intergovernmental immunity objection that might be interposed"); *In re I.J. Knight Realty Corp.*, 501 F.2d 62, 66 (3d Cir. 1974) (Section 960 "was not intended to establish or limit substantive [federal] income tax liability" but only to negate any inference of "an immunity from federal taxation"); *In re New York, N.H. & H.R. Co.*, 360 F. Supp. 1155 (D. Conn. 1973). Petitioners still must establish that some *other* statute imposes tax responsibility on the Liquidating Trustee. That is what they have failed to do.

Other cases cited by petitioners involve individuals or entities who exercised broad authority over the disposition of the corporation's assets – either by virtue of their status as statutory receivers under state or federal law or as the result of a contract – because the corporation itself had been dissolved or was otherwise wholly defunct. *Hersloff v. United States*, 310 F.2d 947 (Ct. Cl. 1962); *United States v. Loo*, 248 F.2d 765 (9th Cir. 1957); *Pinkerton v. United States*, 170 F.2d 846 (7th Cir. 1948); *Kavanagh v. First National Bank of Wyandotte*, 139 F.2d 309 (6th Cir. 1943); *Louisville Property Co. v. Commissioner*, 140 F.2d 547 (6th Cir.), *cert. denied*, 322 U.S. 754 & 755 (1944); *First National Bank v. United States*, 86 F.2d 938 (10th Cir. 1936); *Tazewell Elec. Light & Power Co. v. Strother*, 84 F.2d 327 (4th Cir. 1936); *Whitney Realty Co. v. Commissioner*, 80 F.2d 429 (6th Cir. 1935); *Northwest Utilities Securities Corp. v. Helvering*, 67 F.2d 619 (8th Cir. 1933); *Hellebush v. Commissioner*, 65 F.2d 902 (6th Cir. 1933). But the courts in the present case based their determination on the fact that the Liquidating Trustee does *not* exercise plenary authority of the type exercised by the receivers and trustees in each of the supposedly conflicting cases. (He could not exercise such authority because, in sharp contrast to petitioners' cases, the debtors here are neither dissolved or defunct, but rather have emerged from bankruptcy as reorganized entities.) Because the very characteristic held to be dispositive in the present case was absent in these other cases, they cannot be said to conflict with the decision below. The decisions cited by petitioners shed no light whatsoever on the result that would obtain if those courts were confronted with the quite different factual circumstances presented here.

Indeed, precedent within the Eleventh Circuit itself recognizes that receivers or trustees with wide-ranging discretion are subject to tax obligations. One of the allegedly conflicting cases relied upon by the debtors (Pet. 24 n.30) is *Taylor Oil & Gas Co. v. Commissioner*, 47 F.2d 108 (5th Cir.), *cert. denied*, 283 U.S. 862 (1931), a

decision that constitutes binding circuit precedent within the Eleventh Circuit (*see Bonner v. City of Pritchard*, 661 F.2d 1206, 1209-1211 (11th Cir. 1981)). *Taylor Oil* differs from the present case because of the grant to the Liquidating Trustees of "full power to settle [the corporation's] affairs, collect the outstanding debts, and divide the moneys and other property of the corporation among the stockholders, after paying all the debts due and owing." 47 F.2d at 108.[25] *Taylor* thus indicates that there is no conflict between the Eleventh Circuit rule and that of the other circuits: all agree that statutory bankruptcy trustees and individuals or entities exercising broad discretion over the debtor's assets are subject to tax obligations.

The debtors filed a suggestion for rehearing en banc in the court of appeals relying on the alleged conflict between *Taylor* and the present case. Not one judge, including the dissenting judge below, requested a vote on the suggestion. The Eleventh Circuit plainly recognized that it was applying a different rule based on the significantly different facts of the present case.

The only question presented by this case is whether tax obligations may be imposed on a Liquidating Trustee who exercised solely ministerial authority. The courts below resolved this question of first impression by concluding that they may not. No court of appeals has reached a different determination. The absence of any conflicting authority weighs strongly against further review.

[25] The specific issue presented in *Taylor Oil* was whether the trustees were paying the relevant taxes on their own behalf or on behalf of the company. The court's conclusion was that the trustees were obligated to pay taxes on behalf of the company, the precise result that petitioners contend for here.

D. The Question Presented Does Not Warrant Review By This Court.

The foregoing discussion establishes that review by this Court is not warranted in this case. First, the dire practical implications hypothesized by petitioners are entirely speculative. There is no evidence at all that the use of Liquidating Trustees endowed with only ministerial authority is growing or that such trusts are being used as a device to avoid payment of taxes. Petitioners' failure to point to any reported case in the *three years* since the bankruptcy court's decision certainly undercuts petitioners' argument that the issue warrants this Court's immediate attention. Moreover, the IRS retains complete authority to protect the public fisc through its participation in the approval of reorganization plans. There is no danger that substantial tax revenues could be lost unless – as here – the government simply fails to utilize its authority to participate in bankruptcy cases.[26]

[26] The government may argue that it will bear too great a burden if it is required to participate in every Chapter 11 case in order to protect its right to recover taxes. But, as the IRS's own manual recognizes, the government already participates in these cases to maximize recovery of pre-confirmation tax liability, which may be discharged pursuant to a reorganization plan. *See, e.g., In re International Horizons, Inc.*, 751 F.2d 1213 (11th Cir. 1985) (holding that tax liability claim was barred because IRS failed to assert claim prior to the bar date); *In re St. Louis Freight Lines, Inc.*, 45 Bankr. 546 (Bankr. E.D. Mich. 1984). Indeed, some of the potential tax liability that is the subject of this action – any gain from the sale of the "Washington Properties" – is pre-confirmation liability.

There is no danger that the government will not learn of a pending reorganization proceeding. The IRS typically is a party to bankruptcy proceedings as a creditor. Moreover, the Bankruptcy Rules specifically provide that in a Chapter 11 case, the Service must receive copies of all notices required to be mailed to all creditors. Rule 2002(j)(3). There accordingly can be no doubt that the government has ample ability to protect its interest.

Second, petitioners' arguments on the merits reduce to a fact-bound dispute over the amount of discretion granted to this particular Liquidating Trustee in this particular case. Petitioners cannot point to a single case in which the degree of discretion was held irrelevant or a single case in which Section 6012(b) was held to apply to an individual or entity with the limited discretion of the Liquidating Trustee here.

Third, what this case really amounts to is an effort by the debtors and the IRS to use this collateral proceeding to subject the Liquidating Trustee to obligations that the debtors and the IRS failed to press in the context of the reorganization proceeding. Here, of course, there is no way for other parties, who already have changed position in reliance on the confirmed reorganization plan, to protect their interests. In view of the narrow compass of the question presented and the absence of any conflict among the courts of appeals, there is no reason to give petitioners this second bite at the apple at the expense of other parties who relied on the outcome of the bankruptcy proceeding. The petitions for a writ of certiorari should be denied.

CONCLUSION

The IRS has not been excused by law from complying with the Bankruptcy Code and with orders of the bankruptcy court. The facts of this case are unique and fully support the result. Three courts below reached the same result. The facts and the result do not conflict with any decision by this Court or by any of the courts of appeals.

It is respectfully submitted that the petitions should be denied.

Respectfully submitted,

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57(13)1.226 [Excerpts from the Internal Revenue Manual]
Chapter 11, Reorganization

(1) Any person (individuals, partnerships and public and private corporations) who can be a debtor in a Chapter 7 case may also be a debtor under Chapter 11. A railroad may also be a debtor in a Chapter 11 proceeding. Excepted are stock brokers and commodity brokers (section 109(d)). Cases under Chapter 11 may be voluntary (petitioned by debtor) or involuntary (petitioned by creditors) and are commenced by filing a petition with the bankruptcy court. The filing of a voluntary petition constitutes an automatic order for relief. Approval of the court is not necessary (section 301). A husband and wife may file a joint petition and the court will determine to what extent, if any, their estates should be consolidated (section 302).

(a) Upon filing of the petition, the court can, for cause, if requested by a party in interest, order the appointment of a trustee to operate the business (section 1104(a)). But if a trustee is not appointed, the debtor may continue, as debtor-in-possession, to operate the business.

(b) After the order for relief has been issued, the court shall appoint a committee of unsecured creditors, ordinarily consisting of persons (which does not include governmental units) willing to serve, who hold the seven largest claims (section 1102(a)(1) and (b)(1)). The committee shall consult with the trustee or debtor-in-possession, investigate the debtor's acts, financial condition, operation of the business, etc. It shall participate in the formulation of a plan, advise those it represents of its

recommendations as to the plan and solicit and file acceptances (section 1103(c)).

(2) Sections 1121 through 1129 deal with the requirements of a Chapter 11 plan and the confirmation process.

(a) The holder of a claim may accept or reject the plan. The Secretary of the Treasury may accept or reject a plan on behalf of the United States, when the U.S. is a creditor (section 1126(a)).

(b) Acceptance of a plan is not necessary, nor will it necessarily be solicited by the debtor, if the claim holder is not impaired (section 1126(f)). Impairment is defined at section 1124.

(c) Administrative tax claims and "gap" period expenses in an involuntary case must be paid in full, in cash, upon confirmation unless the Government agrees otherwise (section 1129(a)(9)(A)). Unsecured prepetition priority taxes must be paid in cash, but may be paid over a period not exceeding six years after the taxes are assessed. The payments must be of a value as of the date of the plan that equals the allowed amount of the claim; that is, interest must be included in determining the value of the claim.

(d) With respect to a lien claimant, the plan must provide, absent full payment upon confirmation or any agreement between the parties, that the holder of the claim either retains the lien securing the claim; obtains a lien on the proceeds of any sale of the secured property; benefits from any method which guarantees that the lienholder will receive the "indubitable equivalent," e.g., realty or personalty, of the allowed amount of the secured claim; or receives deferred cash payments totalling the allowed amount of the claim of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property (section 1129(b)(2)(A)).

(e) With respect to unsecured non-priority claims, a plan must provide, absent an agreement between the parties, that the claim holder receives, at a minimum, either deferred cash payments or property of a value, as of the effective date of the plan, of the greater of the allowed amount of the claim (section 1129(b)(2)) or the amount that would have been received in a liquidating proceeding (section 1129(b)(2)(B)).

(f) Basically, it must be shown that the plan is "fair and equitable." (section 1129(b)(2)). This typically means that, in the absence of a class of creditors having accepted the plan, any proposal must insure that each claim holder receives property (cash, real estate or personal property) of a value, as of the effective date of the plan, that is not less than the amount the claim holder would have received under a Chapter 7 liquidation (section 1129(a)(7)).

(g) Once the plan is accepted by creditors that hold at least two-thirds in amount and more than half in number of the allowed claims of a class, and the plan has met all other requirements of section 1126, the court shall hold a hearing on confirmation of the plan (section 1128). The plan will be confirmed if all of the requirements of section 1129 are met. The confirmation, in general, discharges partnerships and corporate debtors from all debts

that arose before confirmation (section 1141(d)(1)), including priority and general tax claims, but individual debtors remain liable for all non-dischargeable debts (1141(d)(2)). Priority taxes, under section 507(a)(7) and other tax exceptions to discharge in section 523 (See IRM 57(13)1.23(13)) are not dischargeable for individuals.

(h) A proof of claim is deemed filed for any claim scheduled in the petition, unless such claim is scheduled as disputed, contingent or unliquidated (section 1111(a)). However, the position of the Service is that a proof of claim will be filed in *all Chapter 11 cases*, to properly protect the Government's interest against erroneous information in a debtor's schedules.

* * *

57(13)2.42
Time for Filing (Bar Dates)

(1) The Bankruptcy Rules effective August 1, 1983 prescribe the time limits for filing proofs of claim.

(2) Rule 3002(c) provides that, in Chapter 7 and Chapter 13 cases, proofs of claim must be filed within 90 days of the first date set for the first meeting of creditors. However, see IRM 57(13)7.1 regarding postconfirmation claims in Chapter 13 cases.

(3) Rule 3003(c)(3) provides that in Chapter 11 cases the court will set and may, for cause, extend the time limit for filing a proof of claim. Rule 2002(a) provides for twenty day notice to creditors of this bar date.

(4) Recommended interim rules on Chapter 12 cases set a Chapter 12 bar date the same as a Chapter 13 under

Rule 3002(c) i.e. 90 days from the first date set for the meeting of creditors. These interim rules have been recommended to the local courts for adoption as local rules of court until formal rules are instituted.

(5) A creditor must generally file a timely proof of claim to share in the distribution of the proceeds of the estate unless the debtor, trustee or a co-debtor files a proof of claim on behalf of the creditor. In Chapter 11 cases only, it is not necessary to file a proof of claim if the debt is scheduled as liquidated, undisputed and not contingent.

(6) If the debtor schedules the tax liability or if one of the parties named above files a proof of claim on behalf of the Service, it is the Service's policy to file a proof of claim in any case to accurately set forth the amount due the Government.

(7) If no proof of claim was filed prior to the bar date SPf should determine whether a late proof of claim is warranted based on the amount of the liability and the likelihood of collection through the proceedings. A late proof of claim should not generally be filed unless the amount collectible in the proceedings exceeds the amount stated in 7(13)2.3:(1) of LEM V. If a proof of claim is warranted based on these factors, SPf should further consider the necessity for a proof of claim based on the likely duration of the proceedings and the prospects of postbankruptcy collection. If, after considering these factors a proof of claim appears to be warranted, SPf should promptly seek district counsel's opinion.

57(13)2.43
Preparation

57(13)2.431
Form 6338 Proof of Claim

(1) SPf, in the district where the proceeding is pending, or where there are outstanding liabilities, will prepare the appropriate proof of claim from the information secured from Form 2552, IDRS research and from the TDA Register, and Currently Not Collectible Accounts Register. SPf must file the proof of claim for the current balance due before the bar date, or any extension thereof, even though a petition to the United States Tax Court, an offer in compromise, adjustment, or any other action is pending which may thereafter give rise to a need for amendment of the claim filed.

(2) SPf will prepare Form 6338 in accordance with Exhibit 5700-62. The case files must be sufficiently well documented to clearly establish the basis for the proof of claim entries. A worksheet designed to show the adjustments made to IDRS or MRS transcript data to arrive at the proof of claim entries may be used for this purpose. This worksheet can be used by supervisory or advisory personnel who review and sign the proof of claim.

(3) When SPf prepares a proof of claim, it will make a determination as to the category of each liability listed on the claim, e.g., secured claim, unsecured priority claim or unsecured general claim. See IRM 57(13)2.47 and Exhibits 5700-66 and 5700-67.

(4) All tax liabilities accrued as of the petition date must be included on Form 6338. For these purposes, the entire income tax liability accrues at the close of the taxable year. Periods (other than income tax) beginning before and ending after the petition date may have to be split between prepetition and post-petition claims. SPf should secure a copy of the return to allocate liabilities and payments to the prepetition and administrative claims. Because of the higher priority of administrative claims, the period should be split if the administrative portion of the liability will exceed the amount specified in 7(13)2.3:(1) of LEM V. If it is apparent from a review of the transcript that the administrative portion will not exceed this amount, the entire liability for the period may be claimed as prepetition.

(5) A copy of the earliest Notice of Federal Tax Lien which establishes the Government's priority for each liability listed as a secured claim on Form 6338 should be attached to the proof of claim. Subsequent filings of the same notices in other jurisdictions need not be attached. Districts with automated lien indexes that do not retain the recording officials' acknowledged copy of notices of Federal Tax Lien should attach a generated copy of the Notice of Federal Tax Lien.

(6) Section 506 (a) states that an allowed claim of a creditor that is subject to setoff under section 553 is a secured claim to the extent of the amount subject to setoff, and is an unsecured claim to the extent that the amount so subject to setoff is less than the amount of such allowed claim. Consequently, the amount to be setoff should be shown under item A. Secured Claims, on Form 6338 and noted with an asterisk. The following statement should also be shown:

"The Internal Revenue Service has the right to setoff this amount. which represents all (a portion) of the debtor's (debtors') (type of tax) refund for (period). Therefore the amount claimed in this proof of claim is secured under 11 U.S.C. 506(a) to the extent of the right of setoff, which is currently stayed under 362(a)(7)."

(a) The amount of the credit balance should be shown in item 7 of Form 6338.

(b) Often, the amount held for setoff is less than the total tax liability. In such a case, the excess over the amount shown as a secured claim should be shown in item B, Unsecured Priority Claims, or in item C, Unsecured General Claims, as appropriate.

(7) Priority taxes payable as other than seventh priority (see Exhibits 5700-66 and 5700-67) should be set out separately on Form 6338. SPf should include a statement explaining the priority claimed and the B/C section relied on.

(8) Pre-petition interest and prepetition penalties are allowable on all categories of claim. SPf should take the following steps to determine the correct amount of claimable penalties and interest.

(a) Secure an INTST printout to the petition date if it is available. This will furnish correct interest and failure to pay penalty for the proof of claim.

(b) If an INTST printout cannot be obtained, use command codes COMPA and COMPAF to secure interest and failure to pay penalty respectively.

(c) Compare the due date of the return to the petition date to determine the correct amount of claimable failure to file penalty. If penalty attributable to months after the petition is included in the assessment (e.g. 20% failure to file penalty is assessed and the petition date is less than three months and one day after the return due date), the penalty must be recomputed for proof of claim purposes.

(d) Postpetition interest is allowable on 'oversecured' claims. B/C section 506(b). If the claim is secured by a filed Notice of Federal Tax Lien it will not be immediately known whether the claim is 'oversecured'. Because the government's lien claims are rarely 'oversecured,' SPf should compute interest to the petition date. However, if the claim is secured by a credit balance in excess of the liability, postpetition interest is allowable to the extent of the excess. SPf should compute and claim interest to date and enter a statement on the proof of claim that interest will continue to accrue at the rate established under IRC 6621(b) until the account is satisfied.

(e) Compute and claim all prepetition penalties and interest for filed returns that are not yet assessed, whether the assessment is pending or prohibited by Section 362(a). SPf need not compute and claim penalties and interest for estimated liabilities. Periods for which returns were prepared under authority of IRC 6020(b) should be considered estimated liabilities only if the thirty day appeal period has not yet expired.

(f) See Exhibit 5700-112 for a chart describing the proof of claim treatment of penalties and interest in various circumstances.

(g) Penalties on priority and general unsecured claims need not be claimed unless there is good reason to expect they will be paid in the proceeding.

(9) The Bankruptcy Code requires disallowance of any claim which results from a credit reduction attributable to late payments to the state, in the amount of an otherwise applicable credit to the debtor in connection with F.U.T.A. payments. Therefore, the Government's claim will be disallowed the same as if a credit had been allowed in full on the Federal return, Form 940 (section 502(b)(8)). Also, in the case of wages paid by the trustee, IRC 3302(a)(5) provides that if the failure to pay contributions timely was without fault by the trustee, there will be no credit reduction.

(10) Since some taxpayers are engaged in multiple enterprises, and different entities sometimes have almost identical names, the outstanding assessments listed on the proof of claim should be carefully checked so that there will be included only those assessments outstanding against the particular taxpayer entity involved in the proceeding. When related taxpayer entities are involved in separate proceedings, a separate proof of claim is required for each taxpayer entity. If a corporation is involved, the claim should include corporate taxes only.

(11) When a partnership and some or all of the individual partners are involved in insolvency proceedings, care should be taken that the taxes claimed are clearly identified so that there will be no question as to which are *partnership* and which are *individual* liabilities. A proof of claim covering taxes for which the partnership

as such may be liable should be filed both in the partnership proceeding and in the proceeding involving the individual partners. Proofs of claim covering taxes of the individual partners should be filed in both the individual and the partnership proceedings. *See Legal Reference Guide for Revenue Officers.*

(12) If criminal prosecution of the taxpayer is under consideration, it may be advisable to vary this procedure. In such instance, SPf should consult district counsel. A review of the case will be made with either the Criminal Investigation function or district counsel. Cases in which the Criminal Investigation function has recommended withholding collection will be referred to district counsel for review.

57(13)2.432
Form 6338A, Request for Payment
of Internal Revenue Taxes

(1) SPf may use Form 6338A to claim administrative and 'involuntary gap period' taxes that are not paid in full on demand. SPf should prepare it as shown in Exhibit 5700-63.

(2) In general interest and penalties on administrative liabilities are claimable in full. There are two exceptions:

(a) IRC 6658 provides that the failure to pay penalty, the failure to pay estimated individual income tax penalty and the failure to pay estimated corporate income tax penalty will not be charged during bankruptcy if the failure to pay was pursuant to a court

finding of probable lack of funds. This relief does not apply to withheld or collected taxes.

(b) If a case is converted to another chapter and the administrative tax liabilities of the prior proceeding remain unpaid, interest and failure to pay penalty are allowable only to the date of conversion.

(3) The order of payment of the expenses of administration is not set out in the Bankruptcy Code and Federal taxes falling within that classification generally are paid on an equal priority with the other items of administration expense. In a converted case, administrative claims of the superseded Chapter 11, Chapter 12 or Chapter 13 proceeding are junior to the administrative expenses of the Chapter 7 estate. B/C Section 726(b).

57(13)2.44
Service of Proof of Claim

(1) SPf should send Parts 1 and 2 of the proof of claim to the proper official of the court by regular mail, or delivered by Collection personnel. The court official should be requested to acknowledge the receipt of the proof of claim by stamp or endorsement on Part 2 and to show thereon the time and place of filing. The receipted Part 2 should be returned to the SPf where it will be retained as evidence of filing in the event this act is later contested. SPf should send Part 3 by regular mail delivery to the fiduciary and note the case file as to the date of service.

(2) If the proof of claim is sent by mail to the proper official of the court or the fiduciary, Letter 981(DO)

should be used to transmit the claim if the court or the fiduciary requires a cover letter. See Exhibit 5700-64.

(3) If there is reason to believe that the timeliness of the filing of the claim may become an issue, or if it is desirable to establish evidentiary proof of its receipt by the proper party, the proof of claim may be delivered personally or sent by certified mail, return receipt requested.

(4) Part 4 of the proof of claim will be furnished to the United States Attorney upon return to the SPf of Part 2, properly acknowledging receipt of Part 1 by the court or fiduciary. SPf should forward the initial proof of claim filed in a proceeding to the United States Attorney. In some districts, the U.S. Attorney's Office prefers not to receive a copy of proofs of claim and has so advised the District Director's Office. In those districts, SPf should retain Part 4 with the case folder.

(5) SPf should forward Part 4 of any amended, supplemental, or consolidated proof of claim to the United States Attorney if the initial proof of claim was furnished to that office.

(6) If the acknowledged copy of a proof of claim is not received from the fiduciary or court within a reasonable time after the claim was forwarded, the SPf should initiate action to secure the acknowledged copy of the proof of claim. Actions might include a phone call or letter to the fiduciary or court official *(see Letter 985(DO) Exhibit 5700-65)*, a field visit by SPf personnel or the initiation of a Form 2209 to either secure the acknowledged copy of the proof of claim or to file a duplicated

copy of the proof of claim with the fiduciary or the clerk of court (as applicable).

57(13)2.45
Disputed Tax Claims

(1) When the validity or priority of the Federal tax claim is disputed in any proceeding, close cooperation of SPf with district counsel and the United States Attorney is imperative. It is essential that SPf quickly handle requests for information coming from either official so the interests of the Government are protected.

(2) Upon filing of a proof of claim in a proceeding, the Government becomes a party thereto, and officers and employees of the Service may appear as witnesses for the Government or may produce evidence in court in connection with the establishment of the validity of the proof of claim. For this appearance and for the production of evidence of this nature, no express authority need be obtained from the Commissioner so long as the appearance made or the evidence produced is intended to establish the rights of the Government.

57(13)2.46
Unliquidated, Amended, and Supplemental Proof of Claim

57(13)2.461
General

When more time is needed within which to complete the examination of returns or the searches requisite to filing an accurate proof of claim, SPf may ask district counsel to take proper action to secure an extension of the

period for filing a claim. Alternatively, an unliquidated proof of claim may be filed. The request, if made, must allow sufficient time to permit filing of a motion for extension prior to the bar date provided by Rule 3002(c) or (in Chapter 11) set by the court under Rule 3003(c)(3). Since the application for extension must indicate the reason why the additional period is necessary for the filing of the claim, district counsel should be furnished such information at the time the request for extension is made. SPf should be prepared to file a timely unliquidated proof of claim if the extension is denied.

57(13)2.462
Unliquidated Claims

(1) An unliquidated proof of claim is the type of claim filed to protect the Government's interest before the exact liability of the taxpayer is determined. The unliquidated claim generally serves to meet the bar date limitation and must be followed by an amended or a supplemental proof of claim setting forth the correct tax liability after the exact amount owing has been determined.

(2) Proofs of claim (either Form 6338 or 6338-A) should include both liquidated and unliquidated amounts, with the latter being identified as "Unliquidated liability" in the "Remarks" columns. When estimating the amount of tax claimed, rounded figures should be avoided, in every instance the class of tax and the taxable periods with respect to each should be shown separately with the estimated amount for each class of tax and taxable period for which any possible claim may be made in the final amended claim.

(3) SPf should base the estimated tax liability upon the information furnished in any status report. As soon as the correct and complete amount due can be determined, the estimated claim will be superseded by filing an amended proof of claim.

57(13)2.54
General Monitoring and Case Review Procedures

(1) Copies of court papers should be examined as soon as they are received, since in many cases they announce hearings for which the Government will have little time to prepare. These hearings may involve proposed orders which affect the Government's rights. (Sometimes orders affecting the Government's rights are entered without advance notice.)

(2) Schedules attached to the petitions should be examined both to ensure that they include all the taxes due the Government and to determine the taxpayer's financial condition.

(3) Petitions for payment of interim fees and allowances, for leave to sell, abandon, or otherwise dispose of assets, etc., should be considered to determine whether the Government should object.

(4) SPf should be especially vigilant for excessive administrative costs and attorneys' fees.

(5) SPf should also –

(a) *ensure* that all proofs of claim are filed *timely*;

(b) notify fiduciaries of their filing requirements, and, when appropriate, of their responsibilities under Title 31, United States Code, Sections 3713(a) and (b);

(c) ensure that the required account for trust fund taxes is established, that deposits are sufficient and timely, and that all related protective provisions are complied with;

(d) negotiate, when necessary, with fiduciaries concerning deposits and payments;

(e) notify the appropriate district director, as soon as possible, after learning that a pending proceeding involves a debtor from whom another district has responsibility for collecting Federal taxes;

(f) contact the SPf of the other district to coordinate collection action in any case involving a taxpayer who owes Federal taxes in the one district and is the subject of a bankruptcy proceeding pending in another district;

(g) adjust a tax liability because the claim is determined to be excessive or erroneous (if no formal objections have been filed in the proceeding) without reference to district counsel.

(6) for more specific reviews which must be made by SP function, refer to the following (non-inclusive):

(a) For Periodic Case File Review, see IRM 57(13)2.55.

(b) For Review of Collection Statutes, see IRM 57(13)3.17.

(c) For Chapter 11 Case Reviews, see IRM 57(13)5.

(d) For Chapter 12 Case Reviews, see IRM 57(13)6.

(e) For Chapter 13 Case Reviews, see IRM 57(13)7.

57(13)2.55
Periodic Case File Review

SPf should review the proof of claim files periodically to determine the status of the proceeding and the prospects of collection based on the proof of claim filed. Care should be taken in scheduling to minimize unnecessary reviews. For example, schedule the first post-proof of claim review of Chapter 7 bankruptcies later than the date distribution is expected based on SPf's experience. SPF may determine the status of the proceeding by requesting data from the fiduciary on a Letter 984 (DO) (*see Exhibit 5700-74*); through a field investigation by SPf or CFf personnel, or by telephoning the fiduciary and/or the attorney for the estate and making the case history accordingly.

57(13)5
Special Processing in Chapter 11 Cases

57(13)5.1
Initial Processing

(1) Bankruptcy Rule 2002(j) provides that the clerk will mail a copy of all notices to creditors in Chapter 11 proceedings to the District Director of Internal Revenue. SPf should contact the court, through district counsel, if necessary, if Chapter 11 required notices are not received or not received timely.

(2) On receipt of the notice, SPf should record the case in the bankruptcy control log and forward Form 2552 to SCCB or CSf for research and TC 520 input unless this work is done in SPf. See IRM 57(13)2.3. SPf should send Letter 986 (DO), Exhibit 5700-70 at this time unless the court issues orders or instruction sheets concerning the debtor's post petition employment tax responsibilities.

(3) Where SPf and district counsel have agreed that early bankruptcy court action is necessary in high risk cases to prevent postpetition noncompliance. SPf should conduct local research in Chapter 11 cases. IDRS or MRS research should be done to the extent necessary to identify the cases that qualify for referral to counsel. Criteria for these preventive referrals should normally include high prepetition liability and high current payroll. SPf and district counsel should jointly determine the required amounts for each component of the criteria.

(4) If research indicates tax due or return delinquencies:

(a) SPf should prepare and file a proof of claim following the procedures at IRM 57(13)2.4.

(b) SPf should follow the procedures at IRM 57(13)2.35 in return delinquency cases.

(c) If corporate trust fund liabilities are outstanding, SPf should ensure that the One Hundred Percent Penalty investigation is promptly begun. SPf should issue Form 2209, Courtesy investigation, where the taxpayer's RWMS entity score is above the district cutoff score, unless there were TDA's assigned to a Revenue Officer at the time TC 520 was input. (See IRM 57(13)2.61)

(d) SPf should consider issuance of Letter 903 (DO) or, if already issued, delivery of Form 2481, Notice to Make Special Deposit of Taxes, for those debtors-in-possession who meet the criteria in LEM V Sections 621 and 623, respectively. See IRM 5620 for Trust Fund Compliance Program procedures in general.

(5) If a notice of federal tax lien was filed prior to the petition date, the government is entitled to secured claim treatment to the extent of its collateral. The government is also entitled in this circumstance to prevent unauthorized use of cash collateral that secures the government's claim. The debtor-in-possession must obtain consent or court approval in order to use cash collateral. In return for this use, the government is entitled to some form of adequate protection. Bankruptcy Code Section 361 includes a non-exclusive list of examples of what can constitute adequate protection.

(a) Where the government's secured claim is expected to be significant, SPf should send Pattern Letter P-2173(P) or an equivalent local letter to apprise the debtor-in-possession and its counsel of the Service's intention to assert its right to adequate protection.

(b) Negotiations for adequate protection payments or other concessions may be conducted by revenue officer, SPf or district counsel at the discretion of local management.

(6) If research indicates no tax due and no return delinquencies, SPf should nevertheless maintain an open case file and monitor current compliance. Frequency of review should be commensurate with the amount of the debtor's current liability. SPf need not monitor cases where the debtor has no employees but the file should be retained for ready access to TC 520 input information, in no tax due or delinquency cases, SPf should reverse the TC 520 and close the case at confirmation.

(7) Bankruptcy Rule 3003(c)(3) provides that the court will set a bar date for filing proofs of claim in each

Chapter 11 case. Because the bar date is not known well in advance as in Chapter 7, 12 and 13 proceedings, Chapter 11 cases cannot be interfiled in the chronological bar date file. Local management should assign Chapter 11 cases to individual employees or provide an alternative manual or automated control system that will ensure that bar dates are met.

57(13)5.2
Monitoring of Chapter 11 Cases Before Confirmation

(1) SPf function is responsible for monitoring the trustee's or debtor-in-possession's compliance during the pendency of the Chapter 11 proceedings. Close monitoring of employment tax compliance is essential because the government's remedies for noncompliance are necessarily more time consuming than in the case of a delinquent taxpayer not operating under the protection of the bankruptcy court.

(2) SPf should monitor the debtor's compliance with the procedures set out at (3) or (4) below. Frequency of review should be based on the debtor's current employment tax liability to ensure efficient use of SPf resources and early identification of large dollar post petition delinquencies. In determining the frequency and extent of compliance monitoring, SPf should consider whether the debtor owes pre-petition taxes and, if so, the amount(s).

(3) As of 1/9/87, the BMF has been programmed to accept input of TC 136 with a Last Return Amount Code (LRA-CD) of 1, 2, or 3. Select the LRA-CD based on the taxpayer's liability for Form 941 or Form 720 (Windfall

Profit taxes only); 1 = last return amount over $25,000, 2 = last return amount between $5,000 and $25,000 and 3 = last return amount under $5,000. If the fiduciary is liable for both Form 941 and Windfall Profit taxes, select the LRA-CD corresponding to the higher liability. The BMF will compare the taxpayer's deposits with the previous quarterly liability at several points during the current quarter depending on the indicator selected. A transcript labelled FTD-FIDUC will be issued to SPf whenever this systemic check discloses apparent substantial under-depositing. No litigation transcripts will be issued for TC 650 postings of entities to which the TC 136 indicator was input. The TC 136 also suppresses FTD Alert issuance.

(a) Use Form 3177, Notice of Action for Entry on Master File, to request input of TC 136. Enter TC 136 in the transaction code block and enter LRA-CD: 1, 2 or 3 to the right of other. See Exhibit 5700-68 for additional preparation instructions.

(b) If it is necessary to change the LRA-CD because of changes in the fiduciary's payroll, input TC 136 with the new LRA-CD. It is not necessary to input TC 137 to reverse the previous input.

(c) Input TC 137 to terminate systemic monitoring when it is no longer necessary. No LRA-CD is necessary with TC 137. TC 137 reverses all effects of TC 136. If the taxpayer will continue to have a 941 or 720 filing requirement and suppression of FTD Alerts is not appropriate, input TC 136 without the LRA-CD indicator one cycle after input of TC 137.

(d) Currently, whether TC 136 has been input cannot be determined from IDRS or master file research

because it does not appear on any transcripts. Therefore, adequate record of these inputs must be maintained in the case file or elsewhere so that TC 137 can be input when appropriate. As of February, 1988, record of TC 136 and LRA-CD inputs will be displayed on BMF entity transcripts and ENMOD.

(4) Instead of systemic monitoring via input of TC 136 with an LRA-CD, SPf may use the following procedures to monitor the post-petition employment tax compliance of Chapter 11 debtors-in-possession and trustees:

(a) Upon learning that a fiduciary has been appointed or the debtor has been continued in possession, and that the debtors business has employees:

1 Send Letter 986(DO) to advise the fiduciary of the filing and paying requirements for Federal returns and taxes (see Exhibit 5700-70).

2 Supply the fiduciary with Form 6123. Verification of Fiduciary's Federal Tax Deposit, to ensure verification of deposits (see Exhibit 5700-71).

3 Review the fiduciary's compliance in filing returns and paying taxes. This can be done by one of the following methods:

a Check IDRS

b Manual monitoring of deposits using Form 6123 (Exhibit 5700-71).

c Manual monitoring via litigation transcripts.

4 Pattern Letter P-636 (Exhibit 5700-72) may be used for initial contact when fiduciary has failed to pay/ deposit.

5 Pattern Letter P-635 (Exhibit 5700-73) may be used for initial contact when a fiduciary has failed to file.

(b) Monitoring of fiduciary compliance may be accomplished by using Collection field personnel. However, this should only be done if SPf determines that field contact is essential and that field contact by SPf advisors is impracticable. SPf should initiate monitoring by field employees by issuing Form 2209. When initiating Form 2209, SPf will include remarks specifying the purpose of the investigation and the actions required. SPf should also include a statement explaining what to do in the event of a non-compliance. That is, it should state whether the field employee should attempt to secure compliance or whether the investigation should be returned to SPf for follow-up in the bankruptcy court proceeding.

(c) Fiduciary trust fund accounts that are monitored by SPf, or by field personnel, should be excepted from the FTD Alert program. At the time that SPf determines a case is to be monitored for trust fund compliance, SPf should request input of TC 136 (if taxpayer meets the criteria in Exhibit 600-1, Section (3)(a) of LEM V) to suppress the issuance of FTD Alerts during the period that the fiduciary's account is under SPf control. When the case is closed, the fiduciary dismissed, or the taxpayer's case is converted to Chapter 7, SPf will request the input of TC 137 to reverse the TC 136.

(5) All communications received from the trustee or debtor-in-possession and all notices received from the courts should be reviewed upon receipt and, if warranted, a copy should be forwarded to district counsel.

(6) If review of the case file reveals that the federal tax deposits are apparently insufficient, SPf should contact the debtor-in-possession or trustee or, if appropriate, the debtor's representative. If the FTD's are insufficient, inform the debtor or his/her representative that all accrued taxes must be deposited immediately and advise him or her that if noncompliance persists the Service will seek conversion or dismissal of the case and assert the 100-Percent Penalty.

(7) Post petition balance due or delinquent returns should be worked as 'TDA's' and 'TDI's' within the constraints of the Bankruptcy Code.

(a) Contact the debtor or his attorney (or send Pattern Letter P-1931, Exhibit 5700-86, on low dollar cases) and demand immediate full payment or filing of the return with full payment. Set a definite deadline. Field contact should be made on high dollar cases. Local management should set the criteria based on workload and staffing. If contact by SPf personnel is impractical due to distance, Form 2209 should be initiated for Revenue Officer or Revenue Representative contact.

(b) Advise the debtor that if the delinquency is not cured by the agreed date, the Service will request that the court convert or dismiss the case and that the debtor's plan cannot be confirmed unless all post petition taxes are paid in full.

(c) If the debtor is unable to immediately full pay all post petition taxes short term extensions of time may be considered. No extension should be granted if the debtor is obviously unable to pay all current taxes or in cases of flagrant delinquency.

(d) If the delinquency is not resolved, SPf should prepare and file Form 6338A, Request for Payment of Internal Revenue Taxes and, if the amount outstanding exceeds the amount stated in 7(16)4.1 of LEM V, refer the matter to district counsel. In cases involving liabilities less than this amount, SPf should consider a referral to district counsel if there is a potential to further accrual of significant liabilities.

(8) Procedures in (6) and (7) above may be modified as local conditions require. Generally, in districts where the government's motions to convert or dismiss are promptly and favorably acted upon, SPf should expend less resources in attempting to secure compliance prior to referral. Conversely, in districts where debtors have successfully contested such motions or delayed action on them, an early 'routine' referral may be futile. SPf in these districts should take all the actions listed in (6) and (7) above and thoroughly document the results of contacts with non-complying debtors. Chief, SPf and district counsel should jointly determine what efforts SPf should make to secure compliance prior to referral, the required documentation for referrals and referral criteria. All referrals of Chapter 11 cases to district counsel for action on postpetition noncompliance must include:

(a) A statement as to whether the business is still operating.

(b) An estimate of the debtor's current quarterly liability for employment taxes based on number of employees, size of payroll or, if no better information is available, last return amount, and

(c) Copies of any proofs of claim and request for payment filed in the proceeding.

(9) SPf and district counsel should consider whether it would be more efficient, in cases involving post-petition non-compliance, for SPf to prepare an entire referral package. This would include the standard motion or referral letter (to the U.S. Attorney), notice of the motion and any other documents that are routinely required.

(10) SPf's in pilot districts should report post petition non-compliance to the U.S. Trustee in accordance with the local agreement.

(11) Where agreements to do so have been reached, SPf may initially report post-petition non-compliance to the bankruptcy court's estate administrator. If this does not resolve the matter within a reasonable time, SPf should refer the case to district counsel.

57(13)5.3
Processing of Chapter 11 Plans

(1) SPf should send Letter 1715(DO), (Exhibit 5700-76), early in the proceeding to inform the debtor in possession of the minimum requirements for plan confirmation.

(2) Rule 3017(d) provides that upon approval of the disclosure statement, a copy of the plan and the disclosure statement will be sent to all creditors. Rule 2002(b) provides for twenty-five days notice to creditors of the hearing on confirmation. SPf should contact the court, through district counsel if necessary, if plans and disclosure statements are not received timely.

(3) Upon receipt of the plan, SPf should check IDRS and other sources as appropriate, and review the case file to ensure that all outstanding liabilities have been included on a filed proof of claim or request for payment. SPf should contact Examination Division when a Chapter 11 plan is received, whether or not there has been previous communication. The purpose of this contact is to ensure that, if any periods are under examination, a proof of claim will be filed with respect to those periods. Secondly, to determine whether any open examinations have been concluded. Any unliquidated claims must be finalized prior to plan confirmation or they will be estimated for purposes of distribution under the plan. Liabilities that are not provided for will not be included in the distribution and may be discharged.

SPf should also research IDRS and other sources as appropriate and contact Examination Division if a bar date is set by the court before approval of the disclosure statement and distribution of the plan to creditors.

(4) SPf should review the plan to ensure that the government's claim is treated as required by the Bankruptcy Code. SPf should refer the case to district counsel if the plan:

(a) does not provide for all administrative and "gap" period taxes to be paid in full, in cash, upon the effective date of the plan (B/C section 1129(a)(9)(A)).

(b) does not provide for all priority taxes to be paid in full, in cash, within six years from the date of assessment of the tax (B/C section 1129(a)(9)(C)).

(c) proposes to pay all priority taxes, in full, in cash, within six years from the date of assessment with minimal installment plans over the life of the plan and a balloon payments at the end.

(d) will have the effect of giving unsecured general creditors, at any given point in time during the reorganization, a higher cumulative distribution than the Government is receiving for its priority claim.

(e) involves a debtor who is ineligible to file under Chapter 11 (B/C section 109(d)).

(f) requires formal acceptance by the Government.

(g) proposed to distribute property to the Government (B/C section 1129(a)(7)).

(h) appears, in any way, to jeopardize the Government's interest.

(i) does not provide for payment of 'present value' interest on priority and secured tax claims that are to be paid in installments. (Bankruptcy Code sections 1129(a)(9)(C) and 1129(b)(2)(A).

(5) If the plan meets the requirements of the Bankruptcy Code, SPf should next determine whether it is

workable. SPf should consider the disclosure statement and any other readily available source of information in making this determination. If it is apparent that the debtor cannot complete the plan as proposed, SPf should refer it to district counsel. The likelihood of future liquidation or further re-organization is a ground for denial of confirmation under B/C section 1129(a)(11).

(6) All negotiations with the debtor or representative will be conducted by either SPf, district counsel, or the Department of Justice, as appropriate. All documents, other than correspondence, dealing with plans of reorganization are to be prepared by district counsel or the Department of Justice, as appropriate.

(7) If a debtor approaches SPf with a prepetition solicitation for formal acceptance of a proposed plan, the debtor will be referred to district counsel. However, a bankruptcy case file will not be opened until a petition is filed.

57(13)5.4
Postconfirmation Procedures

57(13)5.41
Monitoring the Plan

(1) Upon confirmation a corporate or partnership debtor is discharged of all preconfirmation debts and is bound only to make the payments required under the plan. An individual debtor is not discharged from the debts excepted from discharge by B/C 523. See IRM 57(13)1.23(13). No actions such as abatements of tax or releases of lien should be taken unless specifically ordered by the court because a subsequent default may

result in conversion or dismissal rendering the discharge ineffective. A plan or order that appears to require such action should be referred to counsel unless its intent and scope are completely clear.

(2) TC 520 CC 85 through 88, if present should be reversed and replaced with TC 520 CC 81 because the automatic stay terminates with the discharge. This will prevent offset to periods provided for by the plan and allow normal assessment, notice and TDA processing of subsequent liabilities. Any refunds that the debtor becomes entitled to will have to be generated by use of Form 5792.

(3) Any unpostable returns or adjustments should be noted for assessment on receipt of the next Weekly Bankruptcy List. See IRM 57(13)3.162. Similarly, in individual Chapter 11 cases, unassessed 100-Percent Penalties should be forwarded for assessment.

(4) Payments under the plan should be applied as directed by the court or in the usual order as stated in IRM 57(13)4.3. Payments should be applied to a period until it is 'full paid' according to the terms of the plan. This means payment of the allowed amount of the claim, usually tax plus interest and penalties to the petition date, and 'present value' interest on the claim from the date of confirmation. When all liabilities have been 'full paid' SPf should abate the remaining balances, if any, and close the case whether or not the debtor's plan has been fully completed. SPf should generally not abate the balance on individual modules when other periods have not yet been paid under the plan.

(5) SP function is responsible for monitoring Chapter 11 payment plans. A payment log should be established in order to keep a current record of the debtor's compliance with the plan.

TOUCHE ROSS & CO.
CERTIFIED PUBLIC ACCOUNTANTS

June 5, 1986

Mr. Theodore B. Gould
President
Holywell Corp.
Post Office Box 6279
Charlottesville, VA 22906

Dear Mr. Gould:

This letter is in response to a request by Ed Schumacher regarding the preparation of the tax returns for Miami Center Limited Partnership (MCLP) and Holywell Corporation and Subsidiaries (Holywell).

It is our understanding as a result of substantial consolidation the cash collateral of $28,986,112, held pursuant to a court order of December 13, 1984 was contributed to the confirmed plan. These funds were transferred to the liquidating trustee on October 10, 1985. Prior to the liquidating trustee being empowered, the funds had been invested in U.S. Treasury Securities and substantial amounts of interest were earned. Ed has asked us to look into the taxability of the interest income earned on the funds held by the liquidating trustee. It is also our understanding that all items relating to your individual tax matters will be handled by the accounting firm of Hester, Roth & Callaway.

Based on the above facts, we believe that no new taxable entity has been created by the bankruptcy proceedings for MCLP or Holywell. We further believe that the interest earned on the invested funds should be allocated to the taxable entity that contributed these funds. We will

ensure that this income is included in the tax returns for the entities we prepare.

At this time there is some confusion regarding the scope of our employment under the Bankruptcy Court's Order. We have been advised by our attorney not to proceed with any further processing of tax returns until the position of the liquidating trustee has been clarified regarding this matter. Although we believe that tax work clearly is within our scope as outlined by the Court, until this matter is clarified, we cannot proceed further. As you know, we have already invested time examining some of the issues relating to the return.

*   *   *

If you should have any questions or comments please do not hesitate to contact us.

Very truly yours,

/s/ Clifford G. Benson, Jr.
Clifford G. Benson, Jr.

CB/twp
4999T

HOLYWELL CORPORATION
P.O. Box 6279
Charlottesville, Virginia 22906 — 2564-B Ivy Road
(804) 295-7125 — Charlottesville, Virginia 22901

March 11, 1987

VIA FEDERAL EXPRESS

Irving M. Wolff, Esq.
Holland & Knight
1200 Brickell Avenue, 14th Floor
Miami, Florida 33131

Re: Miami Center Liquidating Trust
As a Taxable Entity

Dear Irving:

Since the Miami Center Liquidating Trust is not a taxable entity, the interest earned on the funds deposited by the Liquidating Trustee in Certificates of Deposit, Treasury Bills, and Repurchase Agreements has been reported as taxable income in 1985 in accordance with Edgar Schumacher's attached memorandum. The taxable interest income has been segregated to the accounts of Twin Development Corporation, Holywell Corporation, the Miami Center Limited Partnership, and myself. The interest income for 1986 will also be reported separately by each of the above taxable entities.

Sincerely yours,

Theodore B. Gould

fm
Attachments

cc: Edgar Schumacher, Jr.

MEMORANDUM

DATE: March 10, 1987

TO: Theodore B. Gould

FROM: Edgar Schumacher, Jr.

RE: ALLOCATION OF INTEREST EARNED ON TRUSTEE'S BANK ACCOUNTS 1985

For the filing of the debtors' respective tax returns for 1985, it was necessary to determine the correct amount of interest earned on their funds. This had to include the period of 10/10/85 through 12/31/85 while their funds were in the Trustee's accounts. I did the analysis to determine the amounts earned by each debtor.

For my analysis, I used Arthur Andersen's summary of receipts for the period 10/10/85 – 4/30/86. I then analyzed the individual bank statements for each account for these months and also considered the interbank transfers among these accounts.

The attached schedule with supporting schedules indicates the amounts of interest earned by the respective taxpayers for 1985 and the first four months of 1986. For 1986 tax returns, I will do a similar analysis for all of 1986.

For 1985, you earned $16,908.40 in interest from the Trustee accounts and included this amount in your 1985 tax return form #1040.

For 1985, MCLP earned $124,480.33 in interest from the Trustee accounts and this was included in the 1985 MCLP partnership tax return form #1040.

As you know, we are working on the accounting transactions for the tax reporting fiscal year of 7/31/86

for both Holywell Corporation and Twin Development Corporation. Each corporation will be reporting its respective amounts on its form #1120 corporation tax return.

fm

Attachment

HOLYWELL CORPORATION
P.O. Box 6279
Charlottesville, Virginia 22906 2564-B Ivy Road
(804) 295-7125 Charlottesville, Virginia 22901

March 19, 1987

Mr. Fred Stanton Smith, Liquidating Trustee
Miami Center Liquidating Trust
c/o The Keyes Company
100 North Biscayne Boulevard, 20th Floor
Miami, Florida 33132

Re: Interest Withheld in 1985

Dear Fred:

During the 1985 period of your trusteeship, Sun Bank withheld $8,414.98 of interest earned on the cash investments and deposited it with the IRS. The third report dated 8/30/86 indicated that steps had been taken to have this amount refunded. To date, I have seen nothing to indicate that this in fact has been done.

Since the Miami Center Liquidating Trust is not a taxable entity, all interest earned is allocable to the appropriate debtors and no interest should have been withheld by the Bank. The appropriate forms should be filed to get a refund of the $8,414.98.

If, in fact, the Trust had a responsibility to file a fiduciary return (which we believe it does not), those returns are due on a calendar year basis. You therefore would have had to file at the end of 1985 and at the end of 1986. You did not and have not been advised to do so. However, the Debtors, as the appropriate taxable entities, have filed tax returns including the 1985 interest income earned. It follows, then, that your advisors' internal opinion is that the Trust is not a separate taxable entity.

I do not understand how seventeen months have elapsed and this tax matter is still considered an open question and not resolved.

For your information, enclosed is recent correspondence to Irving regarding this item.

We all want to get this Trusteeship closed. This issue is one of the impediments that must be resolved to achieve closing.

Sincerely yours,

/s/ Edgar Schumacher, Jr.
Chief Financial Officer

fm

cc: Irving Wolff
Rudy Pittaluga

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-0968-CIV-DAVIS

IN RE:

HOLYWELL CORPORATION,

Debtor.

UNITED STATES OF AMERICA,

Appellant,

vs.

HOLYWELL CORPORATION, etc.,

Appellees.

ORDER AFFIRMING BANKRUPTCY COURT'S ORDER

JURISDICTION

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 158(a). This statute provides that "[t]he district courts . . . shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts."

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Bankruptcy Court erred in striking claim numbers 509 and 512 as untimely;

2. Whether 11 U.S.C. §726(a)(3) applies to tardily-filed claims in a Chapter 11 proceeding; and

3. Whether the trustee waived the right to strike as untimely claim numbers 509 and 512.

STANDARD OF REVIEW

A bankruptcy judge's conclusions of law are freely reviewable on appeal. *Machinery Rental Inc. v. Herpel*, 622 F.2d 709, 713 (5th Cir. 1980); *In re Duque*, 48 B.R. 965 (Bankr. S.D.Fla. 1984). However, findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses. Bankruptcy Rule 8013.

STATEMENT OF THE CASE

Debtor, HOLYWELL CORPORATION (hereinafter "HOLYWELL") and four related entities initiated Chapter 11 bankruptcy proceedings on August 22, 1984. Previously, on July 25, 1984, the Internal Revenue Service ("I.R.S.") had mailed a notice of a $489,063.00 deficiency to HOLYWELL for the tax year ending July 31, 1980. HOLYWELL's schedule of liabilities filed with its bankruptcy petition acknowledge a claim belonging to the I.R.S., but listed the claim as "disputed, contingent, and unliquidated."

Two months after the initiation of bankruptcy, HOLYWELL filed a petition challenging the asserted tax deficiency in the United States Tax Court. The I.R.S. sought dismissal of HOLYWELL's petition for lack of jurisdiction on the basis that it had been filed in violation of 11 U.S.C. §362(a), the automatic stay provision. On August 6, 1985, HOLYWELL moved the Bankruptcy Court for stay relief with respect to the issues raised in the tax case, and on September 4, 1985 the motion was granted. Subsequently, the Tax Court dismissed the

HOLYWELL petition, and a second petition was submitted. The I.R.S. has answered the second petition and the income tax claim is presently awaiting resolution before the Tax Court.

The Bankruptcy Court established January 15, 1985 as the bar date for filing creditor claims. Although the I.R.S. received timely notice of the bar date, it filed claim no. 509 on October 16, 1985 for $3.2 million in income taxes, interest and penalties owed by HOLYWELL. A second claim, claim no. 512, was filed on November 6, 1985 as an amendment to 509, increasing the amount to $3.4 million.

On October 3, 1986, the Trustee in bankruptcy filed a Motion to Strike claims 509 and 512 on the ground that these were untimely filed. The Bankruptcy Court, per Judge Thomas C. Britton, conducted a hearing on the Trustee's Motion on November 6. 1986. At the hearing, counsel for the United States argued that the Motion to Strike should be denied on three separate grounds: (1) the debtor waived the late-filed defense to the income tax portion of claims 509 and 512; (2) claims 509 and 512 are allowable amendments of a timely-filed informal claim; and (3) in a liquidating Chapter 11 proceeding, a late claim is entitled to distribution under 11 U.S.C. §726(a)(3). *See* Appellant's Brief at 7.

Judge Britton found no merit in the first and third defenses. Transcript of 11-10-86 hearing at 13, 14, 27. On November 3, 1985, the Bankruptcy Court entered its order striking claims 509 and 512 as untimely. That order is the subject of this appeal.

DISCUSSION

1. Whether the Bankruptcy Court Erred in Striking Claims 509 and 512 as Untimely

Bankruptcy Rule 3003(c)(2) requires that a creditor whose claim is scheduled as "disputed, contingent, or unliquidated," file a proof of claim before the expiration of the bar date in order to preserve his claim and receive distribution from the debtor's estate. Appellant, UNITED STATES OF AMERICA, contends that the October 22, 1984 petition filed by HOLYWELL in the Tax Court in response to the July 25, 1984 I.R.S. notice of deficiency, together with the I.R.S.' answer to that petition, constituted a timely-filed "informal" claim, properly amendable by the post bar date claims. This argument is not compelling.

Admittedly, the proof of claim need not be "letter perfect" so long as it "apprise[s] the court of the existence, nature, and amount of the claim." *In re South Atlantic Financial Corp.*, 767 F.2d 814, 819 (11th Cir. 1985), *cert. denied, Biscayne 21 Condominium, Inc. v. South Atlantic Financial Corp.*, 475 U.S. 1015 (1986). However, before a party may amend a proof of claim, "there must be something filed in the bankruptcy court capable of being amended." *Id.*, citing *In re International Horizons, Inc.*, 751 F.2d 1213, 1216 (11th Cir. 1985). The debtor's knowledge of the claim, standing alone, does not permit the filing of an amended claim. *Id.*

Here, the I.R.S. filed no documents in Bankruptcy Court detailing its claim prior to the bar date. The Debtor's filing of a petition in Tax Court and the I.R.S.'

answer thereto clearly do not constitute an informal proof of claim, as these were filed with the Tax Court, not the Bankruptcy Court. The notice of deficiency served on HOLYWELL before bankruptcy is also not the equivalent of an informal claim. In *In re International Horizons, Inc.*, 751 F.2d at 1218, the Eleventh Circuit rejected a similar argument that I.R.S. discussions before bankruptcy with a debtor concerning alleged tax liability, coupled with the filing after the bar date of a notice of deficiency, constituted an informal proof of claim. Even assuming that the filing of a notice of deficiency with a debtor is equivalent to filing a proof of claim in Bankruptcy Court,[1] it presumes that the filing occurred post-petition. It cannot be said that the filing of a paper before bankruptcy, as occurred here, constitutes a filing in Bankruptcy Court.

The Bankruptcy Court's only pre-bar date notice of the I.R.S.' claim is the Debtor's bankruptcy petition, which lists Appellant's disputed claim. The Debtor's bankruptcy petition does not satisfy the requirements for amendable informal proofs of claims. *See In re South Atlantic Financial Corp.*, 767 F.2d at 819. Because Appellant had ample opportunity to assert its claim timely, the

[1] The Court agrees with Judge Britton's finding that such an assumption is contrary to the "misdelivery" requirement of Bankruptcy Rule 5005(b). This rule treats proofs of claims filed with a trustee or debtor-in-possession as having been filed with the bankruptcy court *only* when it is clear that the creditor intended to file its proof of claim with the bankruptcy court, but erroneously delivered it to the trustee or debtor. *See In Re South Atlantic Financial Corp.*, 767 F.2d at 819, n.7, citing *In re Evanston Motor Co.*, 735 F.2d 1029, 1031-32 (7th Cir. 1984).

Bankruptcy Court was correct in striking the "formal" claim.[2]

2. Whether 11 U.S.C. §726(a)(3) Applies to Tardily-Filed Claims in a Chapter 11 Proceeding

Appellant contends that even if claims 509 and 512 are considered to be tardily filed, the income tax portion of those claims should be allowed pursuant to 11 U.S.C. §726(a)(3), as tardily-filed claims. In pertinent part, §726(a)(3) provides that the bankruptcy estate shall be distributed "in payment of any allowed unsecured claim proof of which is tardily filed under §501(a) of this title, other than a claim of the kind specified in paragraph 2(c) of this subsection." The UNITED STATES relies on *In re Saymans, Inc.*, 82-2 U.S.T.C. §9703 (Bankr. N.D.Ga. 1982) and *In re Compton Corp.*, 40 B.R. 875 (Bankr. N.D. Texas 1984) for the proposition that §726(a), although found in Chapter 7 of the Bankruptcy Code, applies in this liquidating Chapter 11 proceeding. The *Saymans* court, in a Chapter 11 proceeding, subordinated the Government's tardily-filed claims under §726(a)(3) to the claimants who had timely-filed claims. *In re Saymans, Inc.*, 82-2 U.S.T.C. ¶9703 at 85,539. In *Compton*, the court held that a reorganization proceeding was similar to, and should be treated as, a liquidation case under Chapter 7. *In re Compton*, 40

[2] Debtor's filing for stay relief in Bankruptcy Court also does not suffice as an informal proof of claim capable of amendment. It was filed after the bar date and does not set "forth in great detail the nature of [the] claim." *In re South Atlantic Financial Corp.*, 767 F.2d at 819, citing *In re Guardian Mortgage Investors*, 15 B.R. 284, 285-87 (Bankr. M.D.Fla. 1981).

B.R. at 877. The court in *Compton* found that the "best interests of creditors test" of §1129(a)(7) of Title 11 of the Code[3] requires the court to consider the distribution scheme set out in §726. *Id.*

The cases Appellant relies upon are unpersuasive. *Sayman* provides no explanation for its application of §726(a)(3) in a liquidating Chapter 11 proceeding. More importantly, the language of 11 U.S.C. §103(b) is clear that §726(a)(3) is directly applicable only to cases in Chapter 7. *See also Matter of Colin*, 44 B.R. 806, 808 (Bankr. S.D.N.Y. 1984). Absent statutory or controlling decisional law to the contrary, this Court will follow §103(b)'s directive.

The Court also rejects the argument that §1129(a)(7)(A)(ii) of Title 11 incorporates §726(a). Although §1129's legislative history states that the court will have to consider the various subordination provisions of §726(a),[4] absent specific statutory authorization "neither the Code nor the legislative history suggests that in making the comparison between distribution under the proposed Chapter 11 plan, and the statutory distribution pursuant to §726(a)," a court should equalize the two distributions by reading the provisions of one into the

[3] Section 1129 of Title 11 provides that each holder of a claim or interest who does not accept a plan "will receive or retain under the plan on account of such claim or interest property of a value . . . that is not less than the amount that such holder would so receive . . . if the debtor were liquidated under Chapter 7. . . . " 11 U.S.C. §1129(A)(7)(ii).

[4] *See* House Rep. 95.595, 1st Sess. 412-13 (1977), U.S. Code Cong. & Admin. News, 5787, 6368 (1978).

other. *Matter of Colin*, 44 B.R. at 808. Section 1129(a)(7) merely requires that a court not confirm a reorganization plan if a dissenting creditor would receive more because of his Chapter 7 claim than he would under the plan. *Id.* In the present case, the record reflects that confirmation of the Debtor's plan is not at issue, nor are these dissenting creditors before the Court at this time. Thus, even were the statutory interpretation relied upon by Appellant correct, §1139(a)(7)(A)(ii) is inapplicable in this proceeding. The Bankruptcy Court correctly determined that the I.R.S.' reliance on §726(a)(3) is without merit.

3. Whether the Trustee Waived the Right to Strike Claims 509 and 512 as Untimely

Appellant's final argument is that the bar date is akin to a statute of limitations defense which must be timely pleaded. Thus, it is submitted that HOLYWELL waived the right to object to the income tax portion of Claims 509 and 512 because it waited eight months before challenging these claims.

Contrary to Appellant's argument, HOLYWELL has not waived its right to object to the claims. The Bankruptcy Code and Rules do not set a specific time limitation for the trustee to object to an untimely proof of claim. *See generally*, 8 *Collier on Bankruptcy*, §3007.03 at 3007-7 (15th Ed. 1987). Appellant has cited no case to support this proposition.

In light of the foregoing, this Court AFFIRMS the Bankruptcy Court's Order of November 3, 1985, striking Claims 509 and 512 as untimely.

DONE AND ORDERED in Chambers at Miami, Florida this 20th day of November, 1987.

/s/ Edward B. Davis
~~EDWARD B. DAVIS~~
United States District Judge

cc: Alvarez LeCesne, Esq.
Herbert Stettin, Esq.
Irving Wolfe, Esq.
Betsy Cox. Esq.

CA/vg

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Judge Thomas C. Britton

In the Matter of HOLYWELL CORPORATION, Debtor.	)	NO. 84-01590

MOTION FOR SUBSTANTIVE CONSOLIDATION

July 18, 1985

The above-entitled cause came on for Hearing before the Honorable Thomas C. Britton, one of the Judges of the United States Bankruptcy Court, Room 1406, 51 Southwest 1st Avenue, Miami, Dade County, Florida, at a session of said Court commencing at 9:30 o'clock a.m. on Thursday, July 18, 1985, and the following proceedings were had:

Reported By: Janice Mauldin

* * *

The last point I want to touch on are the tax consequences. In this area I readily concede that I am a babe in the woods and haven't the foggiest notion of what the tax consequences would be on the particular decision that we are talking about right at the moment.

If a modification of this plan or any other adjustment can be made to alleviate adverse tax consequences for the debtors, then I think that a request for such a modification ought to be respected and honored and I would, so

long as I have the discretion to do so, intend to accomplish that result and I don't mean to foreclose it today. I think all of us have recognized in our discussion this morning that there might be tax consequences, we are not certain if we have considered all that we could do to alleviate the adverse tax consequences, and if somebody will bring them to our attention, through you, I imagine, Mr. Kent, we would want to reconsider that, but on the basic question of whether or not I should doom the bank's plan in its present form by just saying that there is no legal predicate here and no justification for me to allow the version of consolidation that is embodied in that plan, I am not willing to take that step today and I am willing to go along with the approach the bank has offered.

Having said all that, let me ask, Mr. Salter, you or Mr. Ziegler, to draft an order that you think you will be in a position to defend without putting me in the position of saying more than I have said in the hearing before us here today. Give Mr. Kent an opportunity to review it.

Mr. Kent, unless that order takes unfair advantage of you, and unless you tell them that it does, I will sign the order. If it does, let me hear from you, I don't want to sandbag you in that fashion, but, quite frankly, I don't want to take the time to sit down and try, in my own words, to enter an order that would reflect my ruling and, at the same time, not go beyond the scope of that.

Is there anything else that we ought to discuss this morning while we are concentrating on this aspect of the case?

MR. ZIEGLER: As to this aspect, no, your Honor, I think that that will cover it and I am sure that we can work out an order with Mr. Kent that will deal with your Honor's sensitivities and concerns. I don't intend, by your having ruled, to now try to jam anything down. We would still cooperate –

THE COURT: Oh, I trust you wouldn't. Mr. Kent has never done that, neither have you, but I wanted to make it clear, while we are talking on the record, that I didn't want that to happen.

* * *

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11 Proceedings

IN RE:	)	CASE NOS. 84-01590-BKC-TCB
	)	84-01591-BKC-TCB
HOLYWELL	)	84-01592-BKC-TCB
CORPORATION,	)	84-01593-BKC-TCB
et. al.	)	84-01594-BKC-TCB
Debtors	)	

AMENDED CONSOLIDATED PLAN OF REORGANIZATION PROPOSED BY THE BANK OF NEW YORK

The Bank of New York submits the following Plan of Reorganization:

* * *

IV. MEANS FOR EXECUTION OF THE PLAN

Sale of Miami Center

The Plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of $255,600,000 pursuant to a contract of sale substantially in the form of Exhibit A annexed hereto (the "Contract of Sale"). Within 5 business days after the Effective Date, the Trustee and BNY or its designee would execute the Contract of Sale, which requires a closing of title within 45 days after the Effective Date.

The purchase price would be paid and applied in the following manner:

(a) BNY would receive a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date, which, assuming a closing

date of June 1, 1985, and no change in BNY's Prime Rate, would be $236,587,618.

(b) BNY would pay the balance of the purchase price in cash (approximately $19,012,382) to the Trustee. The Trustee shall be required to: (i) pay (if requested by BNY, under protest) from such cash the real estate taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the real estate taxes for 1985 due to the Miami Center Closing Date.

(ii) pay (if requested by BNY, under protest) from such cash the Personal Property Taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the personal property taxes for 1985 due to the Miami Center Closing Date.

(iii) take all steps and to make all payments, from such cash (and, if necessary, from the Washington Proceeds) to exercise the purchase option in the MCJV FF&E leases, and to obtain title to the FF&E covered by the MCJV FF&E Leases.

Title to Miami Center would be delivered to BNY or its designee by the Trustee free and clear of all leases, liens, encumbrances and contracts affecting Miami Center, except those set forth on Exhibit B attached hereto, and except as provided in Article XI hereof. At the closing BNY or its designee would receive fee title to the FF&E covered by the Gould FF&E Leases, as a result of the merger of such leases effected by the substantive consolidation of the estates (or Gould, any of the Debtors, or the Trustee would cause any of the Gould Entities that are Lessors under the Gould FF&E Leases to convey directly to MCLP the FF&E covered by such Leases) and would receive fee title to the FF&E covered by the MCJV FF&E Leases as a result of the exercise of the purchase

option on the Miami Center Closing Date. On the Effective Date all other liens and encumbrances, including the mechanics liens and judgment liens on Miami Center are transferred and shall attach to the Trust Property, including the Washington Proceeds, subject to the security interests of BNY securing the BNY Holywell Loan. All contracts affecting Miami Center that are not to be assumed will be rejected in accordance with Article XI hereof. Upon the passing of title of Miami Center to BNY, BNY's lien and security interest in the Washington Proceeds and the other collateral shall be limited to the BNY-Holywell Loan, and the balance of the Washington Proceeds will be available for distribution to Creditors.

BNY may elect to retain its mortgages on and security interests in Miami Center after the passing of title; however, upon the passing of title, the personal liability of the Debtors on the obligations that are secured by such mortgages and security interests shall be released.

* * *

VI. TREATMENT OF CLAIMS AND DISTRIBUTION

The cash portion of the Trust Property, together with interest thereon, shall be distributed by the Trustee to satisfy the interest of each Class as defined above (other than the BNY Class 2 Claim) in the following manner and order of priority:

1(a). Class 1 Claims are not impaired. As soon as practicable after the Miami Center Closing Date, all allowed Class 1 Claims which have been incurred prior to the Effective Date and which have been approved by a Final Order of the Court shall be paid by the Trustee in

full, unless the holder of any such Class 1 Claims shall have agreed to a different treatment of such Class 1 Claims in which case the holder of such Class 1 Claims shall be paid in accordance with such agreement.

1(b). Class 1 Claims which have been incurred prior to the Effective Date and which have not been approved by the Court on or before the Miami Center Closing Date shall be paid by the Trustee, in full as soon as practicable after the same have been approved by a Final Order of the Court, unless the holder of any such Class 1 Claims shall have agreed to a different treatment of such, in which case the holder of such Class 1 Claims shall be paid in accordance with such agreement.

1(c). Class 1 Claims incurred subsequent to the Consummation Date shall be paid by the Trustee, in full, as soon as practicable after the same have been approved by the Creditors Committees unless the holder of any such Class 1 Claim shall have agreed to a different treatment of such Claim, in which case the holder of such Class 1 Claim shall be paid in accordance with such agreement.

2. The Class 2 Claim is impaired. The Class 2 Claim consisting of the principal of the of BNY Debt and interest thereon at the pre-default contract rate to the Miami Center Closing Date shall be paid and satisfied in accordance with the provisions of Article IV hereof.

3. The Class 3 Claim is impaired. As soon as practicable after the Miami Center Closing Date, the Class 3 Claim consisting of the principal of the BNY Holywell Loan and interest thereon at the pre-default contract rate shall be paid.

4. Class 4 Claims are impaired. As soon as practicable after the Miami Center Closing Date, all Allowed Class 4 Secured Claims shall be paid in full as to principal and shall be paid interest at the rate of 10% per annum.

* * *

(6)

No. 90-1484

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

FRED STANTON SMITH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. The decision below conflicts with the decisions of other courts of appeals that have uniformly construed Section 6012(b) to ensure that tax obligations are borne and fulfilled by the fiduciary who possesses the assets and receives the income of the corporation. While respondents have found no support for a "contract trustee" exception to the statute, they nonetheless argue (Bank Br. 24; Smith Br. 27) that the duties of the liquidating trustee in this case were simply too "ministerial" for him to have to report and pay taxes.

But the statute this case involves does not make distinctions that turn on the breadth of the "discretion" afforded to the "trustee," "receiver" or "assignee." Instead, regardless of the scope of their discretion, the statute requires fiduciaries to report and pay taxes if they have "possession of or hold[] title to all or substantially all the property or business of a corporation,

whether or not such property or business is being operated." 26 U.S.C. 6012(b)(3), 6151. The authority of the persons who have been held responsible for taxes under Section 6012 has been derived from a variety of sources: state statutes (*Hersloff* v. *United States*, 310 F.2d 947 (Ct. Cl.), cert. denied, 373 U.S. 923 (1963); *United States* v. *Loo*, 248 F.2d 765 (9th Cir. 1957), cert. denied, 356 U.S. 928 (1958)); federal statutes (*In re Joplin*, 882 F.2d 1507 (10th Cir. 1989); *In re I.J. Knight Realty Corp.*, 501 F.2d 62 (3d Cir. 1974); *United States* v. *Sampsell*, 266 F.2d 631 (9th Cir. 1959); *Kavanagh* v. *First Nat'l Bank*, 139 F.2d 309 (6th Cir. 1943)); and deeds of assignment or trust (*Louisville Property Co.* v. *Commissioner*, 140 F.2d 547 (6th Cir.), certs. denied, 322 U.S. 754 and 755 (1944); *First Nat'l Bank* v. *United States*, 86 F.2d 938 (10th Cir. 1936); *Northwest Utilities Securities Corp.* v. *Helvering*, 67 F.2d 619 (8th Cir. 1933), cert. denied, 291 U.S. 684 (1934)). But the scope of authority conferred on these fiduciaries—beyond the basic authority to dispose of assets and invest proceeds—was not a point of importance in any of these cases. The relevant similarities between these fiduciaries were (i) that they administered all or substantially all a debtor's property and (ii) that their administration of that property resulted in taxable income. See *In re Knight*, 501 F.2d at 66. If they have possession or title to the debtor's property and if they receive income, they are to report and pay taxes. No more is required for Sections 6012 and 6151 to apply.[1]

2. Respondents also contend that the liquidating trustee is not a "trustee in a case under title 11," as the term is used in Section 6012(b)(3). They argue that the term is meant only to encompass what the Bank calls "statutory trustees" (Bank Br. 17) or the trustee calls

[1] See also L. Sheppard, *When Bankruptcy Courts Take Tax Law Into Their Own Hands*, Tax Notes 158, 161-162 (Apr. 15, 1991) (agreeing that the decision in this case creates a conflict among the circuits).

"Title 11 bankruptcy trustee[s]" (Smith Br. 27). None of the additional language that respondents would engraft onto the statute appears in Section 6012 or its legislative history. Moreover, the trustee has now admitted that he *is* a trustee (Smith Br. 22) and that he was appointed in, and has been serving as a trustee in, a case under Title 11 (*ibid.*).[2] Respondents nonetheless contend that the statutory phrase "a trustee in a case under title 11" is a term of art that excludes liquidating trustees (Bank Br. 17). It is hardly surprising that respondents have found no decisions to support that view. Such a narrow construction of the plain (and broad) language of the statute would quite evidently, and improperly, defeat its comprehensive purpose. See Pet. 11-12. Such a construction would, moreover, conflict with the decisions that have held liquidating trustees to be subject to the statutory requirement. See Pet. 10-11.

Indeed, respondents' efforts to distinguish the liquidating trustee from a "statutory trustee" only highlight the artificiality of the distinction they seek to draw. The Bank finds it necessary to apologize (Bank Br. 21) for the "boilerplate" provisions of the plan that grant the trustee broad powers, arguing that the plan actually eliminates "all discretion" as to the disposition of the debtors' assets and distribution of the proceeds (emphasis

[2] The trustee is in a difficult position here as he tries to slip through what he apparently regards as an intended or unintended loophole between 26 U.S.C. 6012 and 31 U.S.C. 3713. See Pet. 14 n.11. The latter provision imposes liability on persons representing insolvents or their estates who pay any debts before paying a claim of the United States. Trustees "acting under title 11" are excepted from liability. The liquidating trustee must acknowledge that he is acting in "a case under title 11" in order to avoid personal liability under Section 3713. Yet, he must maintain that he is not a "trustee in a case under title 11" in order to argue that he has no responsibility to file returns under Section 6012(b)(3). The very precariousness of his position underlines the interlocking nature of the provisions and Congress's straightforward purpose to impose liability on fiduciaries holding corporate assets.

omitted). In other words, what the plan says is not what it means. While that contention is, of course, implausible on its face, it also fails to distinguish the role performed by the liquidating trustee from that of a "statutory trustee" in a Chapter 7 case. Like the liquidating trustee, the Chapter 7 trustee is charged with reducing the debtor's property to money. 11 U.S.C. 704(1). Like the liquidating trustee, the Chapter 7 trustee must distribute that money in accordance with a specified scheme of priorities. 11 U.S.C. 726. That the "statutory trustee" may have certain additional powers under Title 11 is irrelevant to the reach of Section 6012(b)(3), for the trustee in either situation receives all of the corporate assets for liquidation, and in so doing, generates taxable gain and investment income. Since the corporation in both instances is left bereft of its assets, the Internal Revenue Code imposes the obligation to report income and pay taxes on the fiduciary who holds the assets.[3]

3. The Bank now claims that it was its goal from the outset to subvert the trustee's statutory duty to pay federal income taxes by proposing a plan of liquidation that made no express provision for the payment of taxes (Bank Br. 3, 12-16). The trustee was obviously not sure that the Bank's hidden agenda had been accomplished, for he commenced this adversary proceeding in the bankruptcy court to obtain a determination of whether he should report and pay taxes as 26 U.S.C. 6012(b)(3)

[3] Respondents invoke *In re Alan Wood Steel Co.*, 7 Bankr. 697 (Bankr. E.D. Pa. 1980), as a case addresing the status of fiduciaries who have only "ministerial authority." (Bank Br. 19 & n.21; Smith Br. 29.) As we point out in the petition (at 17 n.13), the disbursing agent in *Alan Wood* did not liquidate assets, but only disbursed proceeds. The focus of the *Alan Wood* decision was that the disbursing agent was acting on behalf of the creditors and that the income received was "income of [the] creditors, not income of the debtor." 7 Bankr. at 701. In our case, by contrast, the court of appeals concluded that the income was income of the debtor but that the fiduciary was free from the statutory obligations to report and pay taxes on that income.

and (4) expressly require.[4] The trustee now asserts, however, that the courts below held that the plan of liquidation positively "does not permit payment of the taxes" (Smith Br. 8) and that it is therefore too late (*id.* at 17-20) for the government to demand his compliance with the tax laws. This argument is not only wrong, it was rejected by the court of appeals.

a. In respondents' view, unless the plan specifically provides that the trustee is to obey the law by filing returns and paying taxes, the trustee is not only free, but is *required*, to ignore those obligations. This Court has quite expressly held, however, that nothing in the Bankruptcy Code grants the trustee "*carte blanche* to ignore nonbankruptcy law." *Midlantic Nat'l Bank* v. *New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 502 (1986).

The plan, in any event, lends no support to respondents' claim. The plan does not state that the debtors, rather than the trustee, will report income and pay taxes on the income generated by the trust.[5] Indeed, to the extent the plan suggests anything regarding the trustee's tax responsibilities, it empowers him "to pay and discharge" all lawful claims against the trust assets and provides that "[a]ll * * * obligations incurred by the Trustee in administering the Trust or in any manner connected, incidental or related thereto, shall be a charge against

[4] See *King* v. *United States*, 379 U.S. 329, 338-339 (1964) (trustee personally liable for failing to seek amendment to plan to pay taxes).

[5] The proponent of a plan is not entitled to remain silent about the tax consequences that it believes will result from liquidation of property under its plan, particularly if it takes the position that the taxes will be borne by persons other than those to whom the debtor's assets are to be transferred. See *In re Haukos Farms, Inc.*, 68 Bankr. 428, 434 (Bankr. D. Minn. 1986). In marked contrast to his current posture, the liquidating trustee at one time viewed the Bank's failure to disclosure its intentions regarding who was to bear the tax burden on income and gains generated by the trust as "a material act of omission" (II C.A. App. Tab J, Tr. 91).

the Trust Property" (Pet. App. 9a). Since the trustee's duties to report and pay taxes under 26 U.S.C. 6012 and 6151 create a valid "charge against the Trust Property," the plan itself contains a valid basis for the trustee to pay the taxes as required by law. In this context, the absence of an IRS objection to the proposed plan is not remarkable.

The Bank also errs in faulting the IRS for failing to file a proof of claim with respect to tax liabilities arising out of the trust administration (Bank Br. 4). Under its longstanding procedures, the IRS files proofs of claim for a debtor's *pre-petition* tax liabilities, as it did in this case. The Internal Revenue Manual provisions set forth at pages B4 through B11 of the Bank's brief in opposition describe the procedures for determining and filing such claims. But the claims for liabilities generated by the liquidating trust are *not* pre-petition claims and they are not governed by those provisions of the Internal Revenue Manual. Indeed, taxes on the post-petition gains and investment income received by the trust were not even due when, on October 10, 1985, the Bank recites that it joined with the trustee in substantially consummating the plan. The IRS thus could not have filed a claim prior to plan consummation for the taxes on post-petition income, and the Bank and trustee could hardly have relied on the lack of such a claim in implementing the plan.

The standard procedure for collection of post-petition taxes is for the trustee to file returns and pay the taxes reported due, as 26 U.S.C. 6012 and 6151 require.[6] Our system of taxation depends upon such self-assessment. *Commissioner* v. *Lane-Wells Co.*, 321 U.S. 219, 223 (1944). Once the return is filed by the trustee, the IRS may request payment of any amount not paid with the return as an expense of administration. It may also select the return for audit and, if it finds a deficiency, may request payment of the deficiency on the same basis. The fact that the IRS has not yet formalized its claim against the trust for post-petition income in this case reflects only the failure of the trustee to file required returns, not a breakdown in internal procedures on the part of the IRS.[7]

b. That the plan has progressed beyond the point of substantial consummation does not render the case "moot." The concept of "mootness" in bankruptcy cases is that courts decline to grant relief that would require alteration of a confirmed plan when it has "become legally and practically impossible to unwind the consummation of the plan or otherwise restore the status quo before confirmation." *Miami Center Limited Partnership* v. *Bank of New York*, 838 F.2d 1547, 1557 (11th Cir. 1988), cert. denied, 488 U.S. 823 (1988).[8] As the court of appeals recognized in this case, the government does *not* seek to alter the plan, but only to require the trustee to abide by applicable law (Pet. App. 7a):

> The allegation that certain provisions of the * * * Income Tax Code require the liquidating trustee to file and pay income taxes is not an attempt to modify or alter the Plan. The focus of this allegation is that the liquidating trustee failed to act in accordance with the court-approved Plan.

Nor is there any unfairness in the trustee's current predicament. The trustee took steps to resolve any

[6] Congress recognized that procedure in Section 505(b) of the Bankruptcy Code, which provides for prompt audit of a trustee's final return. See 124 Cong. Rec. 32,350, 32,414 (1978) (statement of Rep. Edwards) and 124 Cong. Rec. 33,989, 34,014 (1978) (statement of Sen. DeConcini) ("The prompt audit procedure would not be available with respect to any tax liability as to which any return required to be filed on behalf of the estate is not filed with the proper tax authority.").

[7] In the absence of a return the IRS has now tentatively computed Holywell's liability for tax, penalties and interest for the tax year ending July 31, 1986, to be in excess of $33 million.

[8] The question whether this bankruptcy concept of "mootness" should be applied to foreclose appellate review of objections to a plan that were made before plan confirmation is currently pending on petition for a writ of certiorari in *Holywell Corp.* v. *Bank of New York*, No. 90-1551 (filed Apr. 8, 1991).

doubts he harbored about his obligations under the plan and under the Internal Revenue Code. He should, of course, have brought this proceeding *before* he began to distribute trust proceeds. His delay in taking appropriate action, either to escrow or pay the taxes due (and seek a refund, if appropriate), cannot be blamed on the IRS.[9]

c. Respondents claim (with obvious irony) that the result could have been avoided here by greater vigilance on the part of the IRS (Smith Br. 16; Bank Br. 11-13). The statute, however, places this duty of vigilance on the trustee, not the government. Moreover, the court of appeals' decision has the potential for great mischief. The court has sanctioned the creation of an entity that is *free to receive income and ignore the revenue laws.* There can be little doubt that creditors will have every inclination to approve plans, such as the one in this case, that permit them to enhance their distributions at the expense of the public fisc. It is not at all clear how the government can defeat such plans if, as the court of appeals has ruled, liquidating trustees have no legal duty either to *report or pay* tax on their income.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MAY 1991

[9] In his complaint in this action, the trustee alleged that the Bank was responsible for misleading him, and he repeats in his brief in opposition (at 22) that the Bank will ultimately be responsible if the trust is held liable for the taxes. The trustee may also be able to recover the excess payments he made to other claimants. See *Danning* v. *General Motors Acceptance Corp. (In re Jules Meyers Pontiac, Inc.)*, 779 F.2d 480 (9th Cir. 1985); *In re Crotts*, 87 Bankr. 418, 421 (Bankr. E.D. Va. 1988); *In re Kelderman*, 75 Bankr. 69 (Bankr. S.D. Iowa 1987).

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(7) (8)

Nos. 90-1361, 90-1484

In the Supreme Court of the United States

OCTOBER TERM, 1991

HOLYWELL CORPORATION, ET AL., PETITIONERS

v.

FRED STANTON SMITH, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

FRED STANTON SMITH, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITIONS FOR WRITS OF CERTIORARI
FILED FEBRUARY 28, 1991 and MARCH 20, 1991
CERTIORARI GRANTED MAY 28, 1991

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1361

HOLYWELL CORPORATION, ET AL., RESPONDENT

v.

FRED STANTON SMITH, ET AL.

No. 90-1484

UNITED STATES OF AMERICA, PETITIONER

v.

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ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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JOINT APPENDIX

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* The opinion of the court of appeals, the order of the court of appeals denying rehearing, the opinion of the district court, the findings of fact and conclusions of law of the bankruptcy court, and the final judgment of the bankruptcy court, as well as provisions of the amended plan of reorganization, are printed in the appendix to the petition for writ of certiorari in case No. 90-1361 and have not been reproduced here.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case Nos. 84-01590-BKC-SMW,
84-01591-BKC-SMW,
84-01592-BKC-SMW,
84-01593-BKC-SMW,
84-01594-BKC-SMW
Adv. No. 87-0627-BKC-SMW-A

IN RE: HOLYWELL CORPORATION, ET AL., DEBTORS

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Chapter 11 Proceedings

DOCKET ENTRIES

Nr.	Date	Proceedings	
1	Dec. 28, 1987	COMPLT. FOR DECLARATORY RELIEF.	am
2	Dec. 29, 1987	SUMMONS & NOTICE OF PRE-TRIAL, etc.	am
3	Dec. 31, 1987	Certificate of Ser. cp# 2.	jd

Nr.	Date	Proceedings
4	Jan. 5, 1988	AMENDED SUMMONS & NOTICE OF TRIAL. JD
5	Jan. 21, 1988	ORDER RESET TRIAL, signed, 1-21-88, set 2-11-88 @ 1P. (eod 1-27-88) jd
5a	Jan. 21, 1988	ORDER RESETTING TRIAL, signed, 1-21-88 reset for 1-26-88 @ 1:30. (eod 1-27-88) jd
5b	Jan. 21, 1988	Defendants mtn to vacate trial setting & to set a new trial date. jd
5c	Jan. 22, 1988	Certificate of srv. re: various dfts summons. jd
6	Jan. 25, 1988	ANSWER & AFFIRMATIVE DEFENSE OF HOLYWELL CORP. JD
7	Jan. 22, 1988	ANSWER & AFFIRMATIVE DEFENSES OF THE BANK OF NEW YOR TO ADVY. COMPLAINT FOR DECLARATORY RLF. jd
8	Feb. 2, 1988	ANSWER OF DEFENDANT UNITED STATES OF AMERICA. jd
9	Feb. 2, 1988	Defendants mtn for Ex Parte Order shortening time for discovery. jd
10	Feb. 2, 1988	EX PARTE ORDER SHORTENING TIME FOR DISCOVERY, signed, 2-2-88, shortened 7 days (eod 2-4-88) jd
11	Feb. 2, 1988	Notice of taking depo re: Touche Ross by V. Salter. jd

Nr.	Date	Proceedings
12	Feb. 2, 1988	Plaintiffs notice to produce. jd
13	Feb. 5, 1988	The Bank of New York's emergency mtn. for ex parte order to compel deposition and production of documents, by Vance E. Salter. am
14	Feb. 5, 1988	Defendant's mtn. for protective order. am
15	Feb. 5, 1988	Defendant's obj. to pltfs. notice to produce. am
16	Feb. 8, 1988	The Bank of New York's filing of affidavit of svc. re: subp. to wit. for depo. to Touche Ross. am
17	Feb. 8, 1988	Certificate of svc. re: CP#13, by aty. for dfdt. (The Bank of New York) am
18	Feb. 8, 1988	Plaintiffs mtn to compel production. jd
19	Feb. 8, 1988	Notice of hrg. cp# 18, set 2-9-88 @ 9:30. jd
20	Feb. 8, 1988	Defendants mtn for protective order obj. to the Bank N.Y. request for production of documents. jd
21	Feb. 8, 1988	Notice of hrg cp# 20, set for 2-9-88 @ 9:30. jd
22	Feb. 8, 1988	Notice of hrg cp# 13, set 2-9-88 @ 9:30. jd
23	Feb. 9, 1988	Request for emerg. hrg & Notice of filing telecopy of mtn for reconsideration of the courts ruling concerning production of Miami Center Joint Venture Tax Returns.

Nr.	Date	Proceedings
24	Feb. 9, 1988	ORDER ON PENDING MTN., signed, 2-9-88 e: cp# 18, 20 gr. (eod 2-17-88) 25
25	Feb. 10, 1988	Defendants Emerg. mtn for reconsideration of 2-9-88 "Order on pending mtn". jd
26	Feb. 16, 1988	Subpoena to Wit re: C G Benson Jr. jd
27	Feb. 17, 1988	AGREED ORDER ON O& Y/ MCJV'S FOR RECONSIDERATION OF THE COURT RULING (2-4-88) CONCERNING PRODUCTION OF MIAMI CENTER JOINT VENTURE TAX RETURNS, signed, 2-16-88 (eod 2-17-88) jd
24a	Feb. 10, 1988	Certificate of srv on sub to wit re: Touche Ross. jd
24b	Feb. 11, 1988	Memorandum in support of Emerg. mtn for reconsideration of 2-9-88 "Order on Pendings mtn of Holywell Corp. by R Mark. jd
28	Feb. 19, 1988	EXHIBIT REGISTER DTD. 2-11-88. (expandable folder) jd
29	Feb. 18, 1988	Transcript dtd. 2-9-88 re: Excerpt from proceedings. jd
30	Feb. 18, 1988	Certificate of mlg. cp# 23, by J Kozyak. jd
22a	Feb. 8, 1988	Response to Emerg. mtn to compel., by J Kozyak. jd

Nr.	Date	Proceedings
31	Mar. 1, 1988	Defedants obj. to mtn to strike, & Rule 9011 mtn for sanctions. jd
32	Mar. 8, 1988	Defendants mtn for judicial notice, by R Mark. jd
33	Mar. 9, 1988	Notice of hrg. cp# 31b, set for 3-22-88 @ 9:30. jd
34	Mar. 11, 1988	Notice of hrg. cp# 32, set for 3-22-88 @ 9:30. jd
35	Mar. 18, 1988	Defendant Bank of NY notice of reliance on additional auth. in support of its positions. jd
31a	Feb. 11, 1988	TRANSCRIPT dtd. 2-11-88 mtn for order requiring complaince etc. jd
36	Mar. 22, 1988	AGREED ORDER W/D RULE 9011 MTN FOR SANCTIONS & GR MTN TO STRIKE (3-22-88) (EOD 3-23-88) JD
37	Mar. 22, 1988	RESPONSE to debtors obj, mtn to strike & Rule 9011 mtn for sanctions, by pltf. jd
38	Mar. 22, 1988	ORDER (SMW) GR. mtn for judicial notice (EOD 3-31-88) jd
39	Apr. 15, 1988	EMERGENCY MTN by dfdt U S of America. jd.
40	Apr. 19, 1988	TRANSCRIPT hrg dtd 3-22-88 re: mtn for final hrg regarding clm # 502. jd
41	Apr. 25, 1988	NOTICE of hrg cp# 39, set 4-26-88 @ 1:30. jd

Nr.	Date	Proceedings
42	Apr. 29, 1988	FINDINGS OF FACT & CONCLUSION OF LAW (SMW 4-28-88) (EOD 4-29-88) JD
43	Apr. 29, 1988	FINAL JUDGMENT (SMW 4-28-88) in favor of pltf. (EOD 4-29-88)
44	Apr. 29, 1988	ORDER (SMW 4-29-88) DENYING MTN of U S OF AMERICA. (EOD 5-2-88) jd
45	May 3, 1988	NOTICE of Appeal by U S of America. jd
46	May 4, 1988	CERTIFICATE of mlg cp# 45, by N Shepherd. jd
47	May 4, 1988	NOTICE of Appeal by Holywell Corp. jd
48	May 5, 1988	CERTIFICATE of mlg cp# 47 by N. Shepherd. jd
49	May 11, 1988	DESIGNATION of Record & Issues by ddt U S of America. jd
50	May 13, 1988	NOTICE OF ENTRY rule 8007(b). jd
49a	May 11, 1988	MEMORANDUM of Law in support of response to emerg. mtn of appellant U S of America for stay by Herbert Stettin. jd
51	May 18, 1988	STATEMENT of Issues on Appeal. jd
52	May 18, 1988	DESIGNATION of Record. jd
53	May 18, 1988	Robert A Mark ltr dtd 5-18-88 re: cp#'s 51 & 52. jd

Nr.	Date	Proceedings
54	June 22, 1988	NOTICE of entry of rule 8007(b). (USDC#88-1053-CIV-JWK)
55	July 8, 1988	ORDER DENYING (TCB FOR SMW 7-8-88) EMERG. MTN FOR RECONSIDERATION OF 2-8-88 ORDER ON PENDING MTNS. (EOD 7-11-88) jd
53a	June 1, 1988	*MEMORANDUM from appeals clerk to U.S.D.C. re: transmittal of appeal record. U.S.D.C. case # 88-1053-CIV-KEHOE Exhbits returned to BKC: jd
56	June 26, 1988	RESPONSE to reply of U S of America to trustee's notice of supplemental auth. by F Stanton Smith. jd

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-0795-CIV-KEHOE

IN RE: HOLYWELL CORPORATION, ET AL., DEBTORS

THE UNITED STATES OF AMERICA, APPELLANT

v.

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, APPELLEE

HOLYWELL CORPORATION, ET AL., APPELLANTS

v.

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, APPELLEE

On Appeal from the United States Bankruptcy Court for the Southern District of Florida

DOCKET ENTRIES

Nr.	Date	Proceedings
1	May 5, 1988	NOTICE of Appeal to District Court from Bankruptcy Judge's Decision.
—	May 5, 1988	RECORD recd from BKC consisting of 1 file folder & BKC docket sheet.

Nr.	Date	Proceedings
2	May 5, 1988	EMERGENCY MOTION for Stay, by Appellant.
3	May 9, 1988	NOTICE of entry purs to Rule 8007(b) in re: Appeal from "Findings of Fact & Conclusions of Law & Final Judgement" entered 4/28/88 by Judge Weaver. (Copies to BKC & Attys of record).
4	May 11, 1988	MOTION for expedited hrg on emergency mot of appellant USA for stay, by Fred Stanton Smith, as liquidating Trustee of Miami Center Liquidating Trust.
5	May 11, 1988	RESPONSE to emergency mot of appellant USA for stay, by appellee The Bank of New York.
6	May 13, 1988	VERIFIED resp to appellee's mot for expedited hrg, by Holywell Corp, Miami Center Ltd. Partnership, Miami Center Corp., Chopin Assoc. & Theodore B. Gould.
7	May 16, 1988	MOTION to cont resolution of emergency mot, by appellant USA.
8	May 17, 1988	RESPONSE to emergency mot of appellant USA for stay, by Trustee
9	May 25, 1988	ORDER JWK-5/25/88) GRANTING M/Stay pending hrg in early June & DENYING M/expedited hrg. (EOD 6/1/88-CCAP).
10	June 3, 1988	MOTION to intervene w/Memo, by SHUTTS & BOWEN.

Nr.	Date	Proceedings
11	June 3, 1988	MEMO in opp to Emergency m/stay, by SHUTTS & BOWEN.
12	June 6, 1988	STIP for setting emerg hrg on m/stay, by Ptys.
13	June 9, 1988	MOTION to intervene & Memo in supp of m/stay, by Movants.
14	June 20, 1988	ORDER (JWK-6/20/88) GRANTING movants mots to intervene. (EOD 7/15/88-CCAP).
15	June 20, 1988	ORDER (JWK-6/20/88) GRANTING Appellant's emerg m/Stay. (EOD 7/15/88-CCAP).
16	June 22, 1988	RESPONSE to Order of Stay, by Ptys.
17	June 27, 1988	INITIAL Brief, by Appellants HOLYWELL, MCLP, MCC & CHOPIN ASSOC.
18	June 29, 1988	Brief, by Appellant U.S.A.
19	July 13, 1988	Brief, by Appellant SHUTTS & BOWEN.
20	July 13, 1988	CONSOLIDATED Answer brief, by Appellee BANK.
21	July 13, 1988	ANSWER Brief, by Trustee SMITH.
22	July 20, 1988	REPLY Brief, by Appellants.
23	July 20, 1988	REPLY Brief, by USA.
24	Aug. 30, 1988	MOTION to Dism appeals as MOOT, by Appellee BANK.
25	Sept. 12, 1988	MOTION for enlargement of time to respond to Appellee's m/dism

Nr.	Date	Proceedings
		appeals as moot, by Appellants Chopin Assoc., MCC, MCLP & Gould & Holywell.
26	Sept. 12, 1988	OPPOSITION to BNY's m/dism appeals as moot, by Appellant USA
27	Sept. 20, 1988	REPLY memo re: Dismissal of apeal as moot, by BANK.
28	Sept. 20, 1988	OPPOSITION to M/Dism appeal as moot, by Appellants.
29	Sept. 27, 1988	ORDER (JWK-9/27/88) GRANTING M/ext of time up to & incl. 9/20/88. (EOD 10/3/88-CC
30	Oct. 19, 1988	NOTICE of setting cause for oral argument 10/28/88 @ 9 a.m. (JWK-10/19/88)
31	Oct. 27, 1988	MOTION for Judicial notice, by Appellants.
32	Oct. 31, 1988	NOTICE of addl auth, w/attachment, by Appellee Fred Stanton Smith.
33	Nov. 21, 1988	NOTICE of suppl authority, by HOLYWELL Appellants.
34	Dec. 5, 1988	MEMO in resp to Appellants' notice of suppl auth, w/exhs, by Appellee Bank
35	Dec. 16, 1988	REPLY to memo in resp to notice of suppl auth., by Appellant HOLYWELL.
36	Dec. 19, 1988	REPLY to memo in resp to notice of suppl auth., by Appellant USA.

Nr.	Date	Proceedings
37	Dec. 20, 1988	MOTION for authorization to consumate ad valorem tax settlement, by SMITH.
38	Dec. 23, 1988	NOTICE of filing suppl auth., by SMITH.
39	Dec. 30, 1988	RESPONSE to notice of suppl auth of SMITH, by Appellants HOLYWELL.
40	Jan. 4, 1989	OBJECTIONS to Trustee's M/authorization to consumate ad valorem tax settlement, by Appellants.
41	Jan. 13, 1989	REPLY to Notice of reliance on addt'l auth., by Appellants.
42	Jan. 25, 1989	OPPOSITION to Trustee's M/Authorize consumation of ad valorem tax settlement, by Appellant USA.
43	Mar. 22, 1989	NOTICE of reliance up addtl auth, by Appellee BANK.
44	Mar. 16, 1989	ORDER (JWK-3/16/89) CONSOLIDATING case w/88-1053-CIV-JWK. (EOD 3/28/89-CCAP)
45	May 3, 1989	MOTION for a status conf., by Shutts & Bowen
46	June 13, 1989	NOTICE of filing suppl auth, by appellee Smith.
47	June 16, 1989	NOTICE of reliance on addl authority, by Appellant U.S.A.
48	June 20, 1989	REPLY to Trustee's suppl authority, by Appellant U.S.A.

Nr.	Date	Proceedings
49	June 22, 1989	MOTION for Judicial notice and reply to trustee's suppl authority, by Holywell Corp and T.B. Gould.
50	June 26, 1989	RESPONSE to notice of U.S.A. reliance on addl authority, by Appellee Bank.
51	July 7, 1989	REPLY to Bank's resp to USA's reliance on add'l authority, by Appellants Holywell and Gould.
52	July 31, 1989	MEMO OPINION (JWK-7/31/89) AFFIRMING F/J and Findings of Fact & Concl of Law entered by BKC on 4/28/88. Bank's m/dism appeal as moot is GRANTED in part and DENIED in part, as set forth in sect II *supra*. The stay of BKC's F/J entered 6/20/88 is VACATED. Intervenor's request to pay costs and fees awarded by BKC is now MOOT. Liquidating trustee's M/to lift stay is now MOOT. (EOD-8/1/89-CCAP).
53	July 31, 1989	NOTICE of entry purs to Rule 8016(b) in re: Appeal from "Findings of Fact & Conclusions of Law & Final Judgment" entered 4/28/88 by Judge Weaver. (Copies to BKC & Attys of Record).
54	July 25, 1989	MOTION for order authorizing payment of pre-petition unsecured claim, by Argonaut Ins. Co.

Nr.	Date	Proceedings
55	July 25, 1989	REQUEST for hrg on M/for order authorizing payment of pre-petition unsecured claim, by Argonaut Ins. Co.
56	Aug. 7, 1989	MOTION for stay pending appeal, by appellant USA.
57	Aug. 8, 1989	MEMO in opp to appellant USA's emergency M/stay, by intervenor Shutts & Bowen.
58	Aug. 8, 1989	RESPONSE in opp to appellant USA's M/stay, by appellee F. Stanton Smith.
59	Aug. 9, 1989	MEMO in opp to appellant USA's emergency M/stay, by appellee Bank of New York.
60	Aug. 14, 1989	ORDER (JUWK-8/14/89) STAYING memo decision entered 7/31/89 until 8/25/89. (EOD–8/22/89-CCAP).
61	Aug. 30, 1989	*NOTICE OF APPEAL* by U.S.A. from memo opinion entered 7/31/89. (Copies to USCA, BKC & Attys of Record & AUSA) (NO FEE REQ'D)
62	Aug. 25, 1989	ORDER (JWK 8/25/89) DENYING emergency M/stay pending appeal. (EOD 8/31/89-CCAP)
63	Sept. 1, 1989	*NOTICE OF APPEAL* by HOLYWELL CORP., MIAMI CENTER LTD. PARTNERSHIP, MIAMI

Nr.	Date	Proceedings
		CENTER CORP., CHOPIN ASSOC. & THEODORE B. GOULD from memo opinion entered 7/31/89. (Copies to USCA, BKC, AUSA & Attys of Record) (FEE paid #82079)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 88-1053-CIV-KEHOE

IN RE: HOLYWELL CORPORATION, ET AL., DEBTORS

THE UNITED STATES OF AMERICA, APPELLANT

v.

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, APPELLEE

HOLYWELL CORPORATION, ET AL., APPELLANTS

v.

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, APPELLEE

On Appeal from the United States Bankruptcy Court for the Southern District of Florida

DOCKET ENTRIES

Nr.	Date	Proceedings
1	June 10, 1988	NOTICE of Appeal to Dist. Court from Bankruptcy Judge's Decision.
–	June 10, 1988	RECORD recd from BKC consisting of 1 file folder & 1 accordian folder of designated items. Note – All transc & exhs designated are filed under 88-795-CIV-JWK.

Nr.	Date	Proceedings
2	June 13, 1988	NOTICE of entry purs to Rule 8007(b) in re: Appeal from "Final Judgment" & the "Findings of Fact & Conclusions of Law" entered 4/28/88 by Judge Weaver. (Copies to BKC & Attys of record).
3	June 20, 1988	MOTION to consolidate w/memo, by Appellants.
4	June 27, 1988	CONSENT to conslidation, by Trustee SMITH.
5	June 27, 1988	INITIAL Brief, by Appellants.
6	July 13, 1988	CONSOLIDATED Answer brief, by BANK OF NEW YORK.
7	July 13, 1988	ANSWER Brief. by Trustee SMITH.
8	Aug. 30, 1988	MOTION to Dism appeals as MOOT, by Appellee BANK.
9	Sept. 12, 1988	MOTION for enlargement of time to respond to Appellee's M/dism appeals as moot, by Holywell, Chopin, MCC, MCLP & Gould, Appellants
10	Sept. 12, 1988	OPPOSITION to BNY's M/dism appeals as moot, by Appellant USA
11	Sept. 20, 1988	OPPOSITION to m/dism appeal as moot, by HOLYWELL Appellants.
12	Sept. 20, 1988	REPLY Memo re: Dism of appeal as moot, by BANK.
13	Sept. 27, 1988	ORDER (JWK 9/27/88) GRANTING ext of time up to & incl. 9/20/88. (EOD 10/3/88-CCA

Nr.	Date	Proceedings
14	Oct. 19, 1988	NOTICE of setting oral argument 10/28/88 @ 9 a.m. (JWK 10/19/88).
15	Oct. 27, 1988	MOTION for Judicial notice, by Appellants.
16	Dec. 5, 1988	MEMO in resp to Appellants' notice of suppl auth, w/exhs, by Appellee Bank.
17	Dec. 19, 1988	REPLY memo to BANK's memo in resp to Notice of suppl auth, by Appellant USA.
18	Dec. 29, 1988	RESPONSE to notice of suppl auth of SMITH, by Appellants HOLYWELL.
19	Jan. 4, 1989	OBJECTIONS to Trustee's M/ auth to consumate settlement, by Appellants.
20	Jan. 13, 1989	REPLY to Notice of reliance on addt'l auth, by Appellants.
21	Jan. 25, 1989	OPPOSITION to Trustee's m/authorize tax settlement, by Appellant USA.
22	Mar. 16, 1989	ORDER (JWK 3/16/89) CONSOLIDATING case w/88-795-CIV-JWK. (EOD 3/28/89)
23	Mar. 22, 1989	NOTICE of reliance upon addl auth, by Appellee BANK.
24	Mar. 30, 1989	ANSWER to notice of reliance upon addl auth, by Appellants.
25	June 13, 1989	NOTICE of filing suppl auth. by Appellee SMITH.
26	June 16, 1989	NOTICE of reliance on addl authority, by Appellant U.S.A.

Nr.	Date	Proceedings
27	June 20, 1989	REPLY to trustee's suppl authority, by Appellant U.S.A.
28	June 26, 1989	RESPONSE to notice of U.S.A. reliance on addl authority, by Appellee Bank of N.Y.
29	July 7, 1989	REPLY to Bank's resp to USA's reliance on add'l authority, by Appellants Holywell and Gould.
30	July 31, 1989	MEMO OPINION (JWK-7/31/89) AFFIRMING F/J and Findings of Fact & Concl of Law entered by BKC on 4/28/88. Bank's m/dism appeal as moot is GRANTED in part and DENIED in part, as set forth in sect II *supra*. The stay of BKC's F/J entered 6/20/88 is VACATED. Intervenor's request to pay costs and fees awarded by BKC is now MOOT. Liquidating trustee's m/to lift stay is now MOOT. (EOD-8/1/89-CCAP).
31	July 31, 1989	NOTICE of entry purs to Rule 8016(b) in re: Appeal from "Findings of Fact & Concl of Law & Final Judgment" entered 4/28/88 by Judge Weaver. (Copies to BKC & Attys of record).
32	July 25, 1989	MOTION for order authorizing payment of pre-petition unsecured claim, by Argonaut Ins. Co.
33	July 25, 1989	REQUEST for hrg on M/for order authorizing payment of pre-petition unsecured claim, by Argonaut Ins. Co.

Nr.	Date	Proceedings
34	Aug. 7, 1989	EMERGENCY MOTION for stay pending appeal, by appellant USA.
35	Aug. 8, 1989	MEMO in opp to appellant USA's emergency M/stay, by intervenor Shutts & Bowen.
36	Aug. 8, 1989	RESPONSE in opp to appellant USA's emergency M/stay, by appellee F. Stanton Smith.
37	Aug. 9, 1989	MEMO in opp to appellant USA's emergency M/stay, by appellee Bank Of New York.
38	Aug. 14, 1989	ORDER (JWK-8/14/89) STAYING memo decision entered 7/31/89 until 8/25/89. (EOD-8/22/89-CCAP).
39	Aug. 30, 1989	*NOTICE OF APPEAL* by U.S.A. from memo opinion entered 7/31/89. (Copies to USCA, AUSA, BKC & Attys of Record) (NO FED REQ'D)
40	Sept. 1, 1989	*NOTICE OF APPEAL* by HOLYWELL CORP., MIAMI CENTER LTD. PARTNERSHIP, MIAMI CENTER CORP., CHOPIN ASSOC. & THEODORE B. GOULD from memo opinion entered 7/31/89. (Copies to USCA, BKC, AUSA & Attys of Record) (NO FEE PAID)
–	Sept. 6, 1989	CLERK's receipt #82137 in the amt of $105.00 for payment of NOA filed 9/1/89.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 89-5862

IN RE: HOLYWELL CORPORATION, DEBTOR

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, PLAINTIFF-APPELLEE

versus

UNITED STATES OF AMERICA, HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, THEODORE B. GOULD, DEFENDANTS-APPELLANTS

SHUTTS & BOWEN, INTERVENOR

BANK OF NEW YORK, DEFENDANT-APPELLEE

IN RE: HOLYWELL CORPORATION, DEBTOR

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, PLAINTIFF-APPELLEE

versus

UNITED STATES OF AMERICA, DEFENDANT

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, THEODORE B. GOULD, DEFENDANTS-APPELLANTS

SHUTTS & BOWEN, INTERVENOR

BANK OF NEW YORK, DEFENDANT-APPELLEE

DOCKET ENTRIES

Date	Proceedings
Aug. 31, 1989	Dup. Notice of Appeal and D.C. Docket Entries & Order
	Sent to juris. screening.
	Appellant's (USA) Emergency Motion for Stay of Judgment and Order Pending Appeal and Motion for Expedited Consideration of Emergency Motion for Stay of Judgment and Order Pending Appeal.
Sept. 1, 1989	Order that the Judgment and Order Pending Appeal are temporarily Stayed until 5:00 p.m. on September 8, 1989, in order that the Court can consider the response, which is to be filed on September 6, 1989. In the meantime, the appeal is expedited and the Clerk is instructed to set a briefing schedule and put this case on the next available oral argument calendar. (PHR)
Sept. 5, 1989	The Bank of New York's Memorandum in Opposition to the Appellant's Emergency Motion fot Stay of Judgment and Order Pending Appeal. (J)
Sept. 5, 1989	Fred Stanton Smith's Memorandum in Opposition to Emergency Motion for Stay of Judgment and Order Pending Appeal. (J)
Sept. 6, 1989	Memorandum of Intervenor Shutts & Bowen in Opposition to the United States Emergency Motion for Stay of Judgment & Order pending Appeal (J)
Sept. 8, 1989	Appeal Information Sheet

Date	Proceedings
Sept. 8, 1989	NOA. DCDS & Order
	Appellant's motion for leave to file a response in support of emergency motion for stay of judgment and order pending appeal. bm.
	Holywell Corporation's memorandum in support of the government emergency motion for stay. bm.
	Order: The motion for stay pending appeal of the judgment and order in this case is GRANTED. The previous order expediting the appeal remains in effect. Appellant's motion for leave to file a response is moot. PHR/PAK/JLE. bm.
Sept. 21, 1989	Brief for Appellant Holywell
Sept. 21, 1989	Brief for Appellant USA
Sept. 21, 1989	Record Excerpts Holywell, USA
Oct. 5, 1989	Case assigned for Oral Argument for November 1, 1989
Oct. 10, 1989	Record on Appeal – No of Vols 7
Oct. 10, 1989	Brief for Amicus (Ce'd)
Oct. 11, 1989	Brief for Appellee (Smith) (CE'd)
Oct. 11, 1989	Brief for Appellee (Bank of NY) (CE'd)
	Brief for Cr. Appellee
Oct. 23, 1989	Reply Brief for Appellant (Holywell)
Oct. 23, 1989	Reply Brief for Appellant (USA) (CE'd)
Nov. 1, 1989	Oral Argument
Nov. 9, 1989	Appellant, Theodore B. Gould's, motion for leave to file response to comments at oral argument. bm.
Nov. 17, 1989	Appellee Fred Stanton Smith's motion to allow notice of supplemental authority. bm.

Date	Proceedings
Nov. 22, 1989	Order: Appellant Theodore B. Gould's motion for leave to file response to comments at oral argument is GRANTED. JWH. bm.
Nov. 22, 1989	Appellant Gould's response to comments at oral argument. bm.
Nov. 22, 1989	Appellee Fred Stanton Smith's motion to submit supplemental authority. bm.
Nov. 27, 1989	Appellant USA's motion for leave to file order regarding related proceeding. bm.
Nov. 28, 1989	Motion of appellee, The Bank of New York, to strike (or for leave to respond to) appellant Theodore B. Gould's post-argument brief. bm.
Dec. 6, 1989	Appellant Gould's motion for leave to file answer to the Bank of New York's reply to Gould's memorandum after oral argument. bm.
Dec. 6, 1989	Appellee Smith's motion to respond to submission of of appellant USA. bm.
Jan. 17, 1990	Order: Appellee Fred Stanton Smith's motion to allow notice of supplemental authority is GRANTED. JWH. bm.
Jan. 17, 1990	Order: Appellee's, Fred Stanton Smith, motion to submit supplemental authority is DENIED. JWH. bm.
Jan. 17, 1990	Order: Appellant United States of America's motion for leave file order regarding related proceedings, construed as a motion for leave to file supplemental authority, is DENIED.
	Appellee The Bank of New York's motion to strike appellant Gould's post-argument brief is DENIED.

Date	Proceedings
	Appellee The Bank of New York's alternative motion for leave to respond to appellant Gould's post-argument brief is DENIED.
	Appellee Smith's motion to respond to submission of supplemental authority of appellant USA is DENIED.
Jan. 17, 1990	Appellant Gould's motion to file answer to the Bank of New York reply to appellant Gould's memorandum after oral argument is DENIED. JWH. bm.
May 8, 1990	Appellants', Holywell, Miami Center Ltd., Miami Center Corp, Chopin Associates, and Theodore B. Gould, motion for stay of related proceedings in lower courts. bm.
June 6, 1990	Appellants' supplemental authority. CE'd. bm.
May 21, 1990	Appellee Smith's memorandum in opposition to motion for stay of related proceedings in lower courts. bm.
May 24, 1990	Appellee Bank of New York's memorandum in opposition to debtors motion for stay. bm.
May 31, 1990	Appellant Gould's reply to Trustee's memorandum in opposition to motion for stay of related proceedings in lower courts. bm.
July 9, 1990	Order. Appellants' motion for stay of related proceedings in lower courts is DENIED. JWH/ERC/AJH. bm.
July 20, 1990	Apellee's, Bank of New York, supplemental authority. bm. CE'd.
Aug. 27, 1990	Motion leave to file Supp. Brief.

Date	Proceedings
Aug. 28, 1990	Order. Leave to File Supp. Brief Denied. JWH.
Sept. 18, 1990	Opinion and Judgment
Sept. 27, 1990	Bill of Costs
Sept. 28, 1990	Motion for Ext. to petition for Rehearing in Banc
Oct. 2, 1990	Appellee's, Bank of New York, response to motion for extension time to file petition for rehearing. bm.
Oct. 2, 1990	Appellee Smith's response to motion for extension of time to file petition for rehearing. bm.
Oct. 3, 1990	Appellants' motion for leave to file suggestion of rehearing in banc with excess pages. bm.
Oct. 19, 1990	Intervenor's motion and memorandum in support of motion for relief from stay.
Oct. 24, 1990	Order: Appellants, Holywell Corporation, Miami Center Limited Partnership. Miami Center Corporation and Chopin Associates, motion for leave to file suggestion of hearing in banc with excess pages, not exceeding 17 pages, is DENIED. JWH. bm. (J)
Oct. 24, 1990	Appellants' Holywell Corporation and Theodore B. Gould objections to intervenor's motion for relief from stay of mandate. bm.
Nov. 6, 1990	Petition for Rehearing in Banc, Appellant.
Dec. 12, 1990	Order Denying Rehearing.

Date	Proceedings
Dec. 28, 1990	Motion for stay of mandate.
Jan. 2, 1991	Memorandum of appellee, The Bank of New York, in opposition to the debtor/appellants' motion for stay of mandate. dfb.
Jan. 3, 1991	Intervenor Shutts & Bowen's objection to appellants' motion for stay of mandate and continuation of order of September 8, 1989. dfb.
Jan. 3, 1991	Appellee Fred Stanton Smith's response in opposition to motion for stay of mandate and continuation of order of September 8, 1989. dfb.
Jan. 15, 1991	Appellee, Bank of New York's motion for leave to submit supplemental authority. dfb.
Jan. 17, 1991	Order: Appellee Bank of New York's motion for leave to submit supplemental authority in support of its response to appellants' motion for stay of the mandate is DENIED. JWH. dfb.
	Order: Motion for stay of mandate Denied, JWH.
	Jdgt. as Mdt. Issued to clerk. dfb.
	Record on appeal Retd. to clerk (7 vols).
	Exhibits Retd. to clerk (1 acc. folder).
Mar. 4, 1991	Notice of Flg. of Cert. Pet. on Feb. 28, 1991.
Mar. 27, 1991	Ntc. of Flg. Cert.
May 31, 1991	Order of S.C.: Granted & Consolidated both cases [No. 90-1484, No. 90-1361].

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
CHAPTER 11 Proceedings

Case Nos. 84-01590-BKC-TCB,
84-01591-BKC-TCB,
84-01592-BKC-TCB,
84-01593-BKC-TCB,
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, ET AL., DEBTORS

AMENDED CONSOLIDATED PLAN OF REORGANIZATION PROPOSED BY THE BANK OF NEW YORK

TABLE OF CONTENTS

The Bank of New York submits the following Plan of Reorganization:

I. *DEFINITIONS*

In addition to such other terms as are defined in other Articles of this Plan, the following terms have the following meanings as used in this Plan:

Administration Claim: A cost or expense of administration of these Chapter II cases, including any actual, necessary expenses of preserving the estates, and any actual, necessary expenses of operating the Debtors' businesses from and after the Petition Dates, to an including the Confirmation Date, and all allowances approved by the Court in accordance with the Code.

Affiliated Creditors: Any "affiliate" of any of the Debtors as "affiliate" is defined in Code § 101(2), including but not limited to, any of the Debtors, any corporations that are wholly or partially owned, either directly or indirectly, by all or any of the Debtors, and any entities in which any or all of the Debtors own an equity interest, including, but not limited to, Twin Development Corporation, HWL Corporation, Parkwell, Inc., Orion Industries, Inc., Parkwell of Florida, Inc., Holywell Construction Co., Charleston Center Corp., Pietro Belluschi & Associates, Inc., NHA corp., Studley-Holywell Assoc., Inc., 1300 N. 17th Street Associates, Eleven DuPont Circle Associates, DuPont Land Associates, 1616 Reminc Limited Partnership, 1616 Arlington Associates, PBA, Inc., TBG Institute, Whitehall Security of Florida, Inc., Whitehall Building Services of Florida, Inc., Orion Engineering of Florida, Inc., Holywell Management of Florida, Inc., Racing Club of Florida, Inc., Holywell Hotels of Florida, Inc., Holywell Trading of Florida, Inc., Holywell Insurance Company, Corpus Christi Associates and Great Western Bank Building Associates, but not including MCJV.

Allowed Claim: A Claim, (a) a proof of which is filed within the time fixed by the Bankruptcy Rules (hereinafter defined) or by the Court, or if the Claim arose from the rejection of an executory contract or unexpired lease, within such other time as may be fixed by the Court, or (b) that has been, or hereafter is, scheduled by Debtors as liquidated in the amount and not disputed or contingent; as to which no objection to the allowance thereof has been filed within any applicable period of time fixed by an order of the court, or as to which any such objection has been determined by a Final Order.

Bank, The Bank, BNY: The Bank of New York.

Bankruptcy Code or Code: Title 11 U.S.C. Sections 101 *et seq*.

Bankruptcy Rules: The Bankruptcy Rules as prescribed by the Supreme Court of the United States, to take effect on August 1, 1983.

BNY Debt: The indebtedness, including interest at the pre-default contract rate to January 31, 1984 and at the post-default contract rate from February 1, 1984, due to BNY from MCLP and Chopin in the amount of approximately $234,342,743 as of March 14, 1985 plus expenses of approximately $1,611,563 to March 14, 1985.

BNY Holywell Loan: The $1,750,000 loan made by BNY to Holywell on October 23, 1982, which loan was guaranteed by Gould, plus interest to October 23, 1983 to August 31, 1984 at the pre-default contract rate and from September 1, 1984 at the post-default contract rate.

Claim: Any right to payment or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment against any of the Debtors in existence on or as of their respective Petition Dates as described in Section 101(4) of the Code.

Confirmation Date: The date of the entry by the Court of the Order of Confirmation (hereinafter defined).

Court: The United States Bankruptcy Court for the Southern District of Florida, including the Bankruptcy Judge presiding in the Debtors Chapter 11 cases, and any Court having competent jurisdiction to hear appeals therefrom.

Creditor: Any person that holds an Allowed Claim, including governmental units.

Chopin: Chopin Associates, a Florida partnership, one of the Debtors.

Creditors Committees: The Creditors Committee of the each of the Debtors, appointed by order of the Bankruptcy Court.

Debtor or Debtors: Gould, MCC, MCLP, Chopin and Holywell, individually and collectively.

Debtors' Plans: The five plans of reorganization, dated February 15, 1985, filed by each of the Debtors'.

Disputed Claim: A claim other than the BNY Debt and the BNY Holywell Loan (i) scheduled by the Debtors as disputed, contingent, undetermined, unliquidated or unknown; or (i) as to which a timely proof of claim and objection has been filed, and which has not been determined by a Final Order.

Effective Date: The date upon which the Order of Confirmation is no longer subject to appeal, on which date no such appeal is then pending, and on which date all of the conditions to the effectiveness of the Plan expressly set forth in the Plan have been satisfied fully or effectively waived.

Final: Shall mean, with respect to any order, decree or judgment of any Court, that such order, decree or judgment is no longer subject to appeal or rehearing and as to which no appeal, rehearing or motion for rehearing is then pending.

FF&E: The furniture, fixtures and equipment owned by or leased to MCLP pursuant to the FF&E leases.

FF&E Leases: The following four FF&E leases:

1. Lease, dated May 14, 1981, between MCLP, as Lessee and MCJV, as Lessor covering certain fixtures and equipment used in the Pavilion Hotel "Category A Lease").

2. Lease, dated May 14, 1981, between MCLP, as Lessee and "CJV, as Lessor covering certain furniture, fixture and equipment used in the Pavilion Hotel "Category B Lease").

3. Lease, [date unknown], between MCLP, as Lessee and Gould and/or one of the Gould Entities covering certain furniture, fixture and equipment used in the Pavilion Hotel (the "Category C Lease").

4. Lease, [date unknown], between MCLP, as Lessee and Gould and/or one of the Gould Entities covering certain furniture, fixture and equipment used in the Pavilion Hotel (the "Category D Lease").

Gould: Theodore B. Gould, an individual, one of the Debtors.

Gould Entities: Any of the entities comprising the defined term "Affiliated Creditors", which are directly or indirectly 100% owned by Gould, including but not limited to, Twin Development Corporation, Holywell, Whitehall Security, Inc., Orion Industries, Inc., Orion Engineering Services, Inc., Charleston Center Corp., 1300 N. 17th Street Associates, Eleven DuPont Circle Associates, DuPont Land Associates, 1616 Reminc Limited Partnership, 1616 Arlington Associates, TBA, Inc., TBG In-

stitute, Racing Club of Florida, Inc., Parkwell Inc., Parkwell of Florida, Inc., Holywell Construction Company, Holywell Management Company of Florida, Inc., HWL Corporation, Peitro Belluschi & Associates, Inc., Holywell Hotels, Inc., Holywell Telecommunications Company, Holywell Trading of Florida, Inc., Holywell Real Estate Holywell Telecommunications of Florida, Inc., Holywell Insurance Company, Corpus Christi Associates, Great Western Bank Building, WHA Corp. and Studley-Holywell Assoc, Inc., but not including MCJV.

Gould FF&E Leases: shall mean collectively, the Category C and Category D Leases.

Holywell Corporation: a Delaware corporation, one of the Debtors.

Market Value: $255,600,000, the appraised market value of Miami Center as of November 15, 1984 as indicated in an appraisal report by Charles V. Failla & Associates, Inc., which report was certified by Charles V. Failla & Associates, Inc., M.A.I.

MCLP: Miami Center Limited Partnership, a Florida limited partnership, one of the Debtors.

MCC: Miami Center Corporation, a Florida corporation, one of the Debtors.

MCJV Claim: shall mean the claim of MCJV filed by O&Y Florida on behalf of O&Y Florida and O&Y Equity for the benefit of MCJV, O&Y Florida and O&Y Equity for unpaid rent due under the MCJV FF&E Leases.

MCJV FF&E Leases: shall mean collectively the Category A and Category B Leases.

MCJV Property: Those unimproved parcels of land adjacent to, or near, Miami Center that are owned by MCJV.

MCJV: Miami Center Joint Venture, a Florida partnership, the partners of which are Gould and O&Y Florida.

Miami Center: The parcel of land located in Miami, Dade County, Florida owned by Chopin and leased to MCLP upon which there is constructed an office/hotel complex.

Miami Center Closing Date: 45 days from the Effective Date.

Order of Confirmation: The Order entered by the Court confirming the Plan in accordance with the provisions of Chapter 11 of the Code.

O&Y: shall mean O&Y Equity and O&Y Florida, collectively.

O&Y Equity: Olympia & York Equity Corp., a New York corporation.

O&Y Florida: Olympia & York Florida Equity Corp., a Florida corporation.

O&Y Arbitration: The arbitration proceeding known as *The Matter of Arbitration between Theodore B. Gould, Claimant and Olympia & York Florida Equity Corp. and O&Y Equity Corp., Respondents* (Case No. 13-115-0547-82) which proceeding resulted in an Award, dated June 1, 1984. On or about September 20, 1984 O&Y filed a motion requesting the Court to lift the automatic stay, to remove Gould as managing joint venture partner and to require Gould to deliver documents to effectuate his removal. On October 24, 1984 an Order was entered denying that part of O&Y's Motion requesting the removal of Gould and the delivery of documents for his removal but granting a lifting of the automatic stay for the limited purpose of permitting O&Y or Gould to contest the Award. O&Y subsequently brought an action in the United States District Court for the Southern District of

New York (Case No. 82-CIV-5918 (WK)), which action seeks to modify or vacate the Award. A hearing was held on February 1, 1985 before Judge Knapp of the Southern District, who reserved decision on the motion.

O&Y Claim: The Claim filed by O&Y Florida against certain of the Debtors on behalf of O&Y Florida and O&Y Equity for the benefit of MCJV, O&Y Florida and O&Y Equity.

Pavillon Hotel: The hotel located in Miami Center.

Parkwell: Collectively, Parkwell Inc., and Parkwell of Florida, Inc., both wholly owned subsidiaries of Holywell.

Pending Litigation: Shall mean the actions described in Exhibit C annexed hereto pending by or against any or all of the Debtors, which Exhibit was taken verbatim from the Debtors' Plans.

Petition Dates: August 22, 1984, the dates on which the Debtors filed their respective Chapter 11 petitions with the Court.

Plan: This Chapter 11 Plan, in its present form, or as it may be amended or modified in accordance with the Code.

Pro-rata: With respect to any distribution on account of any Allowed Claim, in the same proportion as the amount of such Allowed Claim bears to the aggregate amount of all Allowed Claims of its class.

Secured Claim: An Allowed Claim secured by a lien, security interest, judgment or other charge against or interest in property in which any Debtor or the Debtors have an interest, or which is subject to setoff under Section 553 of the Code, not voidable under any section of the Code to the extent of the value (determined in accordance with Section 506(a) of the Code) of the interest of the holder of such Allowed Claim in the Debtors' interest in such property or to the extent of the amount subject to such setoff, as the case may be.

Washington Partnership: 1300 North 17th Street Associates, 1616 Reminc Limited Partnership, Twin Development Corporation, Eleven DuPont Circle Associates and DuPont Land Associates.

Washington Proceeds: The sum of approximately $32,422,798.87, which was received by Gould and certain Gould Entities from the sale of the Washington Properties and which is being held, subject to Court order, in accounts established at Florida National Bank.

Washington Properties: The real and personal property conveyed by the Washington Partnerships pursuant to the Agreement dated July 26, 1984, as amended, by and between the Hadid Investment Group, Inc. and the Washington Partnerships.

II. *SUBSTANTIVE CONSOLIDATION*

Provision for Substantive Consolidation

The Chapter II cases filed by the Debtors as Case Nos. 84-01590, 84-01591, 84-01592, 84-01593, and 84-01594 shall on the Effective Date be substantively consolidated pursuant to this Plan and the property of the estates of the Debtors shall be treated as common assets and the Claims of their Creditors deemed Claims against the common assets. As a result of the substantive consolidation of the Debtors, all Claims between and among the Debtors are eliminated by this Plan, including without limitation, all pre-petition claims, all claims, if any, relating to the ground lease between Chopin and MCLP, all claims, if any, relating to or arising out of the Gould FF&E Leases, and all claims of reimbursement, subrogation, and contribution between and among all Debtors.

III. *CLASSIFICATION OF CLAIMS AND INTERESTS*

For the purposes of distribution under this Plan, Claims and Secured Claims of all Debtors are divided into the following classes:

Class 1—Administration Claims as the same are allowed and ordered paid by the Court.

Class 2—The Secured Claim of BNY for the BNY-Debt, including interest at the pre-default contract rate to February 1, 1984 and at the post-default contract rate thereafter, attorneys' fees, cost and expenses, as provided in the documents evidencing such claims and as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 3—The Secured Claim of BNY for the BNY Holywell Loan including interest at the pre-default contract rate to August 31, 1984 and at the post-default contract rate thereafter, attorneys' fees, costs and expenses, as provided in the documents evidencing such claims and as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 4—All Secured Claims other than the BNY Debt and the BNY Holywell Loan, including interest at the rate of 10% per annum and attorneys' fees, as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 5—All Claims which are entitled to priority under Code § 507 as the same are allowed, approved and ordered paid by the Court, including claims for wages, salaries and commissions entitled to priority under § 507(a)(3) and tax claims of governmental units entitled to priority made § 506 and § 507(a)(6), and including interest on such Claims as authorized by applicable law and allowed any ordered paid by the Court.

Class 6—The Claims of all general unsecured creditors, excluding claims of Affiliated Creditors, and excluding the MCJV Claim and the O&Y Claim.

Class 7—The MCJV Claim and the O&Y Claim.

Class 8—The Claims of Affiliated Creditors.

Class 9—The interest of the Debtors which remain after consummation of this Plan.

IV. *MEANS FOR EXECUTION OF THE PLAN*

Sale of Miami Center

The Plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of $255,600,000 pursuant to a contract of sale substantially in the form of Exhibit A annexed hereto (the "Contract of Sale"). Within 5 business days after the Effective Date, the Trustee and BNY or its designee would execute the Contract of Sale, which requires a closing of title within 45 days after the Effective Date.

The purchase price would be paid and applied in the following manner:

(a) BNY would receive a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date, which, assuming a closing date of June 1, 1985, and no change in BNY's Prime Rate, would be $236,587,618.

(b) BNY would pay the balance of the purchase price in cash (approximately $19,012,382) to the Trustee. The Trustee shall be required to: (i) pay (if requested by BNY, under protest) from such cash the real estate taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the real estate taxes for 1985 due to the Miami Center Closing Date.

(ii) pay (if requested by BNY, under protest) from such cash the Personal Property Taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the personal property taxes for 1985 due to the Miami Center Closing Date.

(iii) take all steps and to make all payments, from such cash (and, if necessary, from the Washington Proceeds) to exercise the purchase option in the MCJV FF&E leases, and to obtain title to the FF&E covered by the MCJV FF&E Leases.

Title to Miami Center would be delivered to BNY or its designee by the Trustee free and clear of all leases, liens, encumbrances and contracts affecting Miami Center, except those set forth on Exhibit B attached hereto, and except as provided in Article XI hereof. At the closing BNY or its designee would receive fee title to the FF&E covered by the Gould FF&E Leases, as a result of the merger of such leases effected by the substantive consolidation of the estates (or Gould, any of the Debtors, or the Trustee would cause any of the Gould Entities that are Lessors under the Gould FF&E Leases to convey directly to MCLP and FF&E covered by such Leases) and would receive fee title to the FF&E covered by the MCJV FF&E Leases as a result of the exercise of the purchase option on the Miami Center Closing Date. On the Effective Date all other liens and encumbrances, including the mechanics liens and judgment liens on Miami Center are transferred and shall attach to the Trust Property, including the Washington Proceeds, subject to the security interests of BNY securing the BNY Holywell Loan. All contracts affecting Miami Center that are not to be assumed will be rejected in accordance with Article XI hereof. Upon the passing of title of Miami Center to BNY, BNY's lien and security interest in the Washington Proceeds and the other collateral shall be limited to the BNY-Holywell Loan, and the bal-

ance of the Washington Proceeds will be available for distribution to Creditors.

BNY may elect to retain its mortgages on and security interests in Miami Center after the passing of title; however, upon the passing of title, the personal liability of the Debtors on the obligations that are secured by such mortgages and security interests shall be released.

V. *CREATION OF TRUST*

1. A Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court (and if requested, after nominations by any party-in-interest) is designated as Trustee of all property of the estates of the Debtors within the meaning of § 541(a) of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors described in Exhibit C and those pending in the litigation against BNY ("Trust Property") to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. The Trust shall be known as the "Miami Center Liquidating Trust".

2. On the Effective Date, all right, title and interest of the Debtors in and to the Trust Property, including Miami Center, shall vest in the Trustee, without further act or deed by the Debtors or any other of them, and without the filing or recording of any instrument of conveyance, assignment or transfer, *subject however*, to all existing liens, mortgages, security interests and encumbrances.

3. Subject to the provisions of this Plan and in order to insure the prompt implementation of the Plan, the Trustee shall have full power and authority to:

(a) Enter into the Contract of Sale and to perform all acts that are necessary or appropriate in accordance with the Contract of Sale;

(b) Perfect and secure his right, title and interest to the Trust Property;

(c) Reduce all of the Trust Property to his possession and hold the same;

(d) Sell and covert the Trust Property to cash and distribute the proceeds as specified herein;

(e) Manage, operate, improve, and protect the Trust Property as specified herein;

(f) Lease or renew leases;

(g) Grant options to purchase and to contract to sell and sell the property owned by the Trust or any part or parts thereof for such purchase price and for cash or on such terms as may be appropriate;

(h) Mortgage, pledge or otherwise encumber the Trust Property or any part or parts thereof;

(i) Exchange and re-exchange the Trust Property or any part or parts thereof for other real or personal property;

(j) Release, convey or assign any right, title or interest in or about the Trust Property;

(k) Pay and discharge any mortgage or other lien or encumbrance against the Trust Property and pay and discharge any other costs, expenses or obligations deemed necessary to preserve the Trust Property or any part thereof or to preserve the Trust;

(l) Improve or repair the Trust Property or any part thereof;

(m) Purchase insurance of all kinds sufficient to protect fully the Trust Property and to protect from liability the Trustee, the Creditors Committees and the employee of any member of the Creditors Committees;

(n) Deposit trust funds and draw checks and make disbursements thereof;

(o) Employ attorneys, accountants, engineers, agents, realtors, rental agents, tax specialists and clerical

and stenographic assistants as may be deemed necessary, at such compensation as the Trustee may deem reasonable;

(p) Take any action required or permitted by this Plan;

(q) Sue and be sued;

(r) Appoint, remove and act through agents, managers and employees and confer upon them such power and authority as may be necessary or advisable;

(s) Invest funds of the Trust in demand and time deposits in any national bank which is an authorized depository for bankruptcy funds in the federal district in which the Trustee resides or to make temporary investments such as short-term certificates of deposit in such bank or treasury bills;

(t) Prosecute and defend all actions affecting the Trust Property;

(u) Settle, compromise, release, discontinue, or adjust by arbitration or otherwise any disputes, litigations, or controversies in favor of or against the Trust Property or the Debtors or any of them, including but not limited to the discontinuances required by the Contract of Sale;

(v) Waive or release rights of any kind relating to the Trust Property or the Debtors or any of them, including but not limited to the releases required by the Contract of Sale;

(w) Deal with the Trust Property or any part or parts thereof in all other ways as would be lawful for any person owning the same to deal therewith, whether similar to or different from the ways above specified, at any time or times hereafter.

(x) Take no action that would change the business of any of the Debtors as conducted at or prior to the filing of the Petitions.

4. In no case shall any party dealing with the Trustee in any manner whatsoever in relation to the Trust Property, or to any part or parts thereof, be obligated to see that the provisions of this Plan or the terms of the Trust have been complied with, or be obligated or privileged to inquire into the authority of the Trustee to act, or to inquire into any other limitation or restriction of the power and authority of the Trustee, but as to any party dealing with the Trustee in any manner whatsoever in relation to the Trust Property, the power of the Trustee to act or otherwise deal with said properties shall be absolute.

5. The Trustee shall receive reasonable compensation for his services subject to the approval of the Court which fee shall be a charge against and paid out of the Trust Property.

6. All costs, expenses and obligations incurred by the Trustee in administering the Trust or in any manner connected, incidental or related thereto, shall be a charge against the Trust Property, and the Court, upon being satisfied as to the correctness of any and all such costs, expenses and obligations, shall approve and direct the payment thereof prior to a distribution to the holders of unsecured Allowed Claims.

7. No recourse shall ever be had, directly or indirectly, against the Trustee or any of his agents or employees personally by legal or equitable proceedings or by virtue of any statute or otherwise, it being expressly understood and agreed that all liabilities of the Trustee or such agents are employees or under this Trust shall be enforceable only against and be satisfied only out of the Trust Property.

8. The Trustee shall not be liable for any act or failure to act in his capacity as trustee hereunder while acting in good faith and in the exercise of his best judgment, nor shall the Trustee be liable in any event except for his own gross negligence, willful default or misconduct.

9. The Trustee may resign at any time by giving written notice of his intention to do so addressed to the Court, and such resignation shall be effective upon the date provided in such notice.

10. In case of the resignation of the Trustee, a successor shall thereupon be appointed by an instrument in writing, signed and acknowledged (i) prior to the acquisition of Miami Center by BNY, by BNY and the Creditors' Committee and (ii) subsequent to the acquisition of Miami Center, by the Creditors Committees and delivered to the resigning Trustee, whereupon such resigning Trustee shall convey, transfer and set over to such successor in trust by appropriate instrument or instruments all of the Trust Property then in his possession and held hereunder. Said successor shall thereupon be vested with all the rights, privileges, powers and duties of the Trustee named herein. Each succeeding Trustee may in like manner resign, and another may in like manner be appointed in his place.

11. If BNY or the Creditors Committees at any time desire to terminate the rights of the Trustees then acting under the Trust and appoint a new Trustee in his stead, BNY and the Creditor Committees may do so by a written instrument, addressed to such Trustee then acting; thereupon like conveyances as in the case of resignation of the Trustee shall be made by the Trustee then acting to the newly appointed Trustee, and such new Trustee shall be vested with all the rights, privileges, powers and duties of the Trustee herein named.

VI. *TREATMENT OF CLAIMS AND DISTRIBUTION*

The cash portion of the Trust Property, together with interest thereon, shall be distributed by the Trustee to satisfy the interest of each Class as defined above (other than the BNY Class 2 Claim) in the following manner and order of priority:

1(a). Class 1 Claims are not impaired. As soon as practicable after the Miami Center Closing Date, all allowed Class 1 Claims which have been incurred prior to the Effective Date and which have been approved by a Final Order of the Court shall be paid by the Trustee in full, unless the holder of any such Class 1 Claims shall have agreed to a different treatment of such Class 1 Claims in which case the holder of such Class 1 Claims shall be paid in accordance with such agreement.

1(b). Class 1 Claims which have been incurred prior to the Effective Date and which have not been approved by the Court on or before the Miami Center Closing Date shall be paid by the Trustee, in full as soon as practicable after the same have been approved by a Final Order of the Court, unless the holder of any such Class 1 Claims shall have agreed to a different treatment of such, in which case the holder of such Class 1 Claims shall be paid in accordance with such agreement.

1(c). Class 1 Claims incurred subsequent to the Consummation Date shall be paid by the Trustee, in full, as soon as practicable after the same have been approved by the Creditors Committees unless the holder of any such Class 1 Claim shall have agreed to a different treatment of such Claim, in which case the holder of such Class 1 Claim shall be paid in accordance with such agreement.

2. The Class 2 Claim is impaired. The Class 2 Claim consisting of the principal of the BNY Debt and interest thereon at the pre-default contract rate to the Miami Center Closing Date shall be paid and satisfied in accordance with the provisions of Article IV hereof.

3. The Class 3 Claim is impaired. As soon as practicable after the Miami Center Closing Date, the Class 3 Claim consisting of the principal of the BNY Holywell Loan and interest thereon at the pre-default contract rate shall be paid.

4. Class 4 Claims are impaired. As soon as practicable after the Miami Center Closing Date, all Allowed Class 4 Secured Claims shall be paid in full as to principal and shall be paid interest at the rate of 10% per annum.

5. Class 5 Claims are not impaired. As soon as practicable after the Miami Center Closing Date, all Allowed Class 5 Claims shall be paid by the Trustee, in full, in an amount equal to the allowed amount of such Class 5 Claim plus interest, unless the holder of any such Class 5 Claim shall have agreed to a different treatment of such Class 5 Claim, in which case the holder of such Class 5 Claim shall be paid in accordance with such agreement.

6. Class 6 Claims may be impaired if there are not sufficient funds to pay this class in full with interest. As soon as practicable after the Miami Center Closing Date all Allowed Class 6 Claims, after payment of the Allowed Class 1, 2, 3, 4, and 5 claims shall be paid in full or in part Pro Rata.

7. Class 7 Claims maybe impaired. As soon as practicable after the Miami Center Closing Date, and the entry of a Final Order or Judgment resolving the O&Y Arbitration, the Allowed Class 7 Claims will be paid from the MCJV Property, if there is a deficiency the claim will be paid to the extent that funds are available after payment of the Allowed Class 1, 2, 3, 4, 5 and 6 Claims.

8. Class 8 Claims are impaired. As soon as practicable after the Miami Center Closing Date and after the payment of Allowed Class 1, 2, 3, 4, 5, 6 and 7 Claims, all Allowed Class 8 Claims shall be paid in full or in part Pro Rata.

9. Class 9 Claims are impaired. As soon as practicable after the Miami Center Closing Date all Allowed Class 7 Claims, after payment of Allowed Class 1, 2, 3, 4, 5, 6, 7 and 8 claims the residue of the estates shall be paid to the Debtors Pro Rata.

VII. *DISPUTED CLAIMS*

A. *Disputed Claim Fund.* As soon as is practicable after the Miami Center Closing Date, and after payment of the Class 1, 2, 3, and 4 Claims out of Trust Property, the Trustee shall establish the Disputed Claim Fund, in an initial amount reasonably necessary to pay the Debtors' anticipated liability on Disputed Claims.

B. *Investment of Disputed Claim Fund.* The Disputed Claim Fund shall be maintained by the Trustee in a separate bank account, and invested and reinvested at prevailing market rates of interest, for like amounts and periods of investment, pending the determination of the allowed amount of each Disputed Claim.

C. *Distribution from Disputed Claim Funds.*

1. *Distribution on Allowed Portion of Claim.* If a Disputed Claim is allowed, in whole or in part, the Trustee shall distribute to the holder of any such Disputed Claim an amount equal to what the holder of such Disputed Claim would have received on the Effective Date if such Disputed Claim were an Allowed Claim.

2. *Distribution of Cash Deposited in Respect of Disallowed Portion of Claim.* If a Disputed Claim is disallowed, in whole or in part, the Trustee shall distribute to the holders of class of creditors that has not paid in full their Pro Rata share of cash theretofore deposited in the Disputed Claim Fund allocable to the disallowed amount of such Disputed Claim.

VIII. *DUTIES OF THE DEBTORS*

Commencing on the Effective Date and continuing thereafter, the Debtors shall devote such time and attention to the affairs of the estates as are necessary to carry out the provisions of the Plan and to comply from time to time with the reasonable requests of BNY, the Trustees and the Creditors Committees. Without limitation of the foregoing the Debtors shall,

(a) in connection with the sale and transfer of Miami Center as provided in Article IV hereof, take all actions requested by BNY, the Trustee or the Creditors Committees to promptly effectuate the sale thereof, including, without limitations, (i) grant BNY and its attorneys, agents, and accountants full and complete access to the books and records of the Debtors relating in any way to Miami Center and permit BNY to contact any tenants or prospective tenants in Miami Center in connection with the terms and conditions of their occupancy or their proposed occupancy, (ii) deliver to the Trustee, promptly after the Effective Date, all documents required to be delivered to BNY under the Contract of Sale, including but not limited to, all plans specifications, drawings, as built plans and surveys, plans, inventories of all personal property, operating manuals, licenses service and maintenance contracts, and deliver all documents, and supply all information necessary or appropriate to close the Contract of Sale and to effectuate a transfer of title to Miami Center as contemplated by Article IV hereof, and the Contract of Sale.

(b) In connection with the distribution to the creditors of the Washington Proceeds and the implementation of the Plan, take all action and supply all information required of Debtors and/or requested by the Creditors Committees or the Trustee in connection with the prompt and timely prosecution of objections to claims filed against the estates, the prompt and speedy defense of litigation against the estates and the execution of all documents and the performance of all acts as may be necessary or desirable to promptly implement and effectuate the distribution to the creditors of the estates, other than Affiliated Creditors and the overall implementation

of the Plan. The Debtors shall cooperate fully with the Trustee and Creditors Committees and shall grant to the Trustee and Creditors Committees access to and shall permit the Trustee and Creditors Committees to copy all financial statements, tax returns, books and records of every kind as are within the possession, custody-control of any of the Debtors regarding objections to claims against the estate with a view toward the prompt determination of said objections and a prompt consummation of the Plan.

(c) Take any and all actions requested by BNY, the Trustee on the Creditors Committee which are deemed necessary or appropriate by BNY, the Trustee, or the Creditors Committee to implement and perform this Plan, whether or not specifically enumerated herein.

IX. CONDITION PRECEDENT TO THE *EFFECTIVENESS OF THE PLAN*

A. The Effective Date shall have occurred.

X. CONDITIONS SUBSEQUENT TO THE *EFFECTIVENESS OF THE PLAN*

A. The Miami Center Closing Date shall have occurred, in any event, by no later than July 1, 1985, and BNY shall have received by such date the discontinuance and releases required to be delivered to BNY under the Contract of Sale. In the event the conditions subsequent have not been satisfied, at BNY's option this Plan shall no longer be effective, and all obligations and agreements of BNY and its designee shall terminate and be of no effect.

XI. *EXECUTORY CONTRACTS*

A. The executory contracts and unexpired leases listed in Exhibit D and any other existing executory contracts or unexpired leases relating to Miami Center Phase I with any party not affiliated with any of the Debtors are hereby assumed, unless prior to the Confirmation Date, BNY shall modify this Plan to add or to delete executory contracts or unexpired leases from Exhibit D.

B. Except for executory contracts expressly assumed or rejected prior to sixty (60) days before the date of the Confirmation Order in accordance with 11 U.S.C. § 365, or Paragraph A of this Article all executory contracts and unexpired leases of the Debtors shall be deemed rejected as of the date of the Confirmation Order. Claims for damages resulting from the rejections of executory contracts shall be filed with the Court no later than thirty (30) days prior to the date of the Confirmation Order or be forever barred and precluded from consideration or participation in distributions from the estate. Claims for damages resulting from executory contracts which are deemed rejected as of the date of the Confirmation Order in accordance with this Article shall be filed with the Court or be forever barred and precluded from consideration or participation in distributions from the estate. Objections to any such Claims shall be filed by the Trustee or the Creditors Committees with the Bankruptcy Court within twenty (20) days after the Claim in question has been filed.

XII. *MODIFICATION OF THE PLAN*

BNY may amend or modify this Plan at any time prior to the entry of the Order of Confirmation, pursuant to Section 1127 (a) of the Code. After the entry of the Order of Confirmation, BNY may, pursuant to Section 1127(b) and (c) of the Code and with approval of the Court, modify or amend the Plan in a manner which does not materially or adversely affect the interests of persons affected by the Plan without having to solicit acceptance of such modification, and may take such steps as are necessary to carry out the purpose and effect of the Plan as modified.

XIII. *RESERVATION OF EQUITABLE RIGHTS*

Notwithstanding anything to the contrary contained herein, all rights are reserved to any party-in-interest, by appropriate proceeding, to assert any equitable claim for relief from the substantive consolidation provisions of the Plan if, but only to the extent, such substantive consolidation, materially and adversely affects the rights of such party in interest.

XIV. *RETENTION OF JURISDICTION*

The Court shall retain jurisdiction after confirmation until payments and distributions called for under the Plan had been made and until the entry of final decree, in respect to the following matters:

(a) to hear and determine all claims, including claims arising from the rejection of any executory contract and any objections which may be made thereto;

(b) to liquidate, or estimate damages or to determine the manner and time for such liquidation or estimation in connection with any contingent or unliquidated claims;

(c) to adjudicate all claims or controversies arising during the pendency of the Chapter II cases;

(d) to allow or disallow any claim; and

(e) to make any orders which may be necessary or appropriate to carry out the provisions of this Plan, including any orders relating to the reservation of equitable rights set forth in Article XIII hereof.

Dated: February 26, 1985, as amended as of March 22, 1985.

THE BANK OF NEW YORK
By: /s/ James Hamilton
Vice President

EMMET, MARVIN & MARTIN
By: /s/ Thomas F. Noone
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STEEL, HECTOR & DAVIS
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MEYER, WEISS, ROSE, ARKIN, SHAMPANIER, ZIEGLER & BARASH, P.A.
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ATTORNEYS FOR THE BANK OF NEW YORK

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case Nos. 84-01590-BKC-TCB,
84-01591-BKC-TCB,
84-01592-BKC-TCB,
84-01593-BKC-TCB,
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, AND THEODORE B. GOULD, DEBTORS

STIPULATION RESPECTING IMPLEMENTATION OF AMENDED CONSOLIDATED PLAN OF REORGANIZATION PROPOSED BY THE BANK OF NEW YORK

THE BANK OF NEW YORK (the "Bank"), and the CREDITORS' COMMITTEE of Debtors MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION and HOLYWELL CORPORATION (collectively, the "Committees"), stipulate and agree by counsel as follows:

1. In the event that the Court confirms the Amended Consolidated Plan proposed by the Bank, the "Effective Date" established in the Bank's Amended Consolidated Plan shall be the date of confirmation, provided that the Court has denied any motion for rehearing or reconsideration, and provided that neither (a) the order of confirmation nor (b) any order denying rehearing or reconsideration has been stayed by any court.

2. In the event of any conflict between the Contract of Purchase attached to the Bank's Plan and the terms of the Plan itself, the terms of the Plan shall govern, provided

that the resolution of such conflict does not adversely affect the title to the Miami Center project to be acquired by the Bank under its Plan.

3. The Bank agrees that any money realized as a result of the tax protests, presently in process for the prior years, shall be added to the fund for the payment of other creditors, provided that the Bank shall be permitted to make the determination to dismiss or settle any such tax protest suits or claims in the event the Bank determines in its sole judgment that it is in the best interest of the Bank to do so.

4. The Liquidating Trustee to be appointed by this Court under the Bank's Plan shall be directed by this Court (a) to pay all "Undisputed Claims" as set forth in an order of this Court, immediately after title to the Miami Center project is vested in the Bank or its nominee pursuant to the Contract of Purchase attached to the Bank's Plan (on or before a date forty-five (45) days after the Effective Date), and (b) to pay all Allowed Claims with interest at the full legal rate, if available in the liquidating fund, provided that such interest shall be paid 90 days after the payment of the principal.

5. The Holywell creditors are entitled to distribution from Holywell assets before distribution from such assets to creditors of other Debtors, and distribution to the Holywell creditors under the Bank's Plan shall be made from the Holywell assets prior to distribution from such assets to creditors of the other Debtors. Such distributions in respect to Undisputed Claims shall be made as provided in Paragraph 4 above, and a fund shall be established by the Liquidating Trustee as a reserve fund for disputed claims. As such disputed claims are allowed, they shall be paid for from such fund.

6 In consideration of the approval of this stipulation by the Court and the entry of an Order to that effect, the

Committees shall withdraw objections to confirmation of the Bank's Plan shall encourage and advise their respective members to vote in favor of that Plan.

7. This stipulation shall terminate in the event, and at such time as, the hearing on confirmation of the Bank's Plan is delayed beyond May 31, 1985.

This stipulation is respectfully submitted for approval by the Court and shall become effective as of the date so approved.

THE BANK OF NEW YORK

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By: /s/ [S. Harvey Ziegler]
S. Harvey Ziegler, Esquire

CREDITORS' COMMITTEES OF MIAMI CENTER LIMITED PARTNERSHIP and MIAMI CENTER CORPORATION

HOLLAND & KNIGHT
1200 Brickell Avenue
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(305) 374-8500

By: /s/ Irving M. Wolff
IRVING M. WOLFF, ESQUIRE

CREDITORS' COMMITTEE OF HOLYWELL CORPORATION

BLANK, ROME, COMISKY & McCAULEY
4770 Biscayne Boulevard
Miami, Florida 33137
(305) 573-5500

By: /s/ Joel M. Aresty
JOEL M. ARESTY, ESQUIRE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case Nos. 84-01590-BKC-TCB,
84-01591-BKC-TCB,
84-01592-BKC-TCB,
84-01593-BKC-TCB,
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, ET AL., DEBTORS

SECOND AMENDMENT TO AMENDED CONSOLIDATED PLAN OR REORGANIZATION PROPOSED BY THE BANK OF NEW YORK

The Bank of New York hereby amends its proposed Amended Consolidated Plan of Reorganization as follows:

1. Add to Article I the following definitions:

"*BNY Funding Agreement:* BNY's agreement to advance to the Trustee up to $14,417,679, in substantially the form of Exhibit E attached hereto."

"*Trustee's Certificate*: The Trustee's Certificate of indebtedness to BNY under the Funding Agreement, in substantially the form of Exhibit F attached hereto."

2. Amend Article III, "*Class 1*" [page 14], to read:

"*Class 1*—Administrative Claims, as the same are allowed and ordered by the Court, and liabilities of the Trustee under any Trustee's Certificate."

3. Add to Article IV, subparagraph (b) (iii) [page 18] the following:

"On the Miami Center Closing Date, BNY agrees to execute and deliver to the Trustee the BNY Funding Agreement."

4. Add to the last paragraph of Article IV [page 19] the following:

"Notwithstanding anything herein contained to the contrary, the liability of the Trustee and the Debtors to BNY under any Trustee's Certificate(s) shall survive the passing of title."

5. Add to Article V, subparagraph (3) [page 24], the following:

"(y) borrow from BNY as contemplated by the BNY Funding Agreement and issue Trustee's Certificates to evidence such borrowing."

6. Change the date in Article X [page 36] from July 1, 1985 to September 15, 1985.

Dated: July 30, 1985

THE BANK OF NEW YORK, by its undersigned attorneys:

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(305) 577-2800

By: /s/ Vance E. Salter
VANCE E. SALTER

EXHIBIT E

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
CHAPTER 11 Proceedings

Case Nos. 84-01590-BKC-TCB,
84-01591-BKC-TCB,
84-01592-BKC-TCB,
84-01593-BKC-TCB,
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, ET AL., DEBTORS

FUNDING AGREEMENT

Agreement made this _____ day of __________, 1985 between The Bank of New York ("BNY") and __________ as Trustee.

BACKGROUND

BNY filed a Consolidated Plan of Reorganization in the captioned proceedings on February 26, 1985, which was amended on March 22, 1985. BNY's plan contemplated the acquisition by BNY for $255,600,000 of the Miami Center Project, which includes an office building hotel, podium, all furniture, fixtures and equipment ("FF&E") used therein, together with the land upon which such improvements are located. Pursuant to two lease agreements dated May 14, 1981 (the "MCJV FF&E Leases"), Miami Center Joint Venture ("MCJV"), a joint venture consisting of debtor Theodore B. Gould ("Gould") and Olympia & York Florida Equity Corp. ("O&Y"), leased certain FF&E

to debtor Miami Center Limited Partnership ("MCLP"). BNY's Amended Plan of Reorganization required MCLP to deliver title to the FF&E covered by the MCJV FF&E Leases to BNY free and clear of all claims of MCJV.

O&Y on behalf of MCJV filed a claim in the captioned proceedings in connection with the MCJV FF&E Leases on December 20, 1984. On July 3, 1985 MCJV (with the approval of Gould and O&Y) filed a claim in connection with the MCJV FF&E Leases in the total amount of $14,417,679; that claim was intended to supersede the earlier claim (the MCJV FF&E claim as so superseded is hereinafter called the "MCJV FF&E Lease Claim"). BNY's Amended Plan of Reorganization classified the MCJV Lease Claim as a Class 7 claim, subordinate in right of payment to all third-party creditor claims (Classes 1 through 6). Objections were filed on behalf of MCJV to the proposed classification. BNY has filed Objections to the MCJV FF&E Lease Claim. In addition, BNY maintains that the MCJV FF&E Leases are not "true leases", but are instead financing agreements. By judgment entered July 17, 1985, from which an appeal has been taken by BNY, the Bankruptcy Court determined that the MCJV FF&E Leases were "true leases".

BNY filed a Second Amended Consolidated Plan which, among other things, provided for the execution and delivery of this Funding Agreement to enable the Trustee to deliver the FF&E covered by the MCJV FF&E Leases to the Bank or its designee. BNY's proposed plan as so amended is hereinafter called "BNY's Amended Plan". BNY's Amended Plan was confirmed by Order dated ____, 1985 and the Trustee was appointed pursuant to the Amended Plan by Order dated ____, 1985.

NOW THEREFORE, in consideration of the premises, the parties agree as follows:

1. If a Final Order (as defined in BNY's Amended Plan) is entered determining that the MCJV FF&E Lease Claim is entitled to payment prior to or concurrently with the Class 1 through Class 6 creditors' Allowed Claims as set forth in BNY's Amended Plan, BNY will advance to the Trustee, within 10 days after written request therefor, the difference between the amount of such claim as determined by that Final Order and the amount of funds available to the Trustee after payment to, and/or provision for, all Allowed Claims in Classes 1 through 6 of BNY's Amended Plan which were filed by the bar date (January 15, 1985). In no event shall BNY be required to advance more than $14,417,679 (the "Commitment Amount") hereunder. The Commitment Amount shall be reduced by the amount of any payments made by the Trustee from time to time in respect to the MCJV FF&E Lease Claim.

2. If a Final Order is entered determining that the MCJV FF&E Lease Claim has been properly classified in BNY's Amended Plan (as junior in priority of distribution to the Allowed Class 1 through Class 6 creditors), BNY shall have no obligation to advance any funds hereunder, and this Funding Agreement shall terminate.

3. The Trustee shall issue to BNY a Trustee's Certificate in substantially the form attached as Exhibit E, to evidence any funds advanced by BNY hereunder. The Trustee shall repay BNY from available funds and assets remaining in the debtors' estates, as set forth in the Trustee's Certificate.

4. Unless the context otherwise requires, all other terms used herein shall have the same meanings as set forth in the BNY's Amended Plan.

In Witness Whereof the parties hereto have caused the Funding Agreement to be executed this _________ day of _______________, 1985.

THE BANK OF NEW YORK

By: ________________________

Vice President

By: ________________________

____________, as Trustee

EXHIBIT F

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
CHAPTER 11 PROCEEDINGS

Case Nos. 84-01590-BKC-TCB,
84-01591-BKC-TCB,
84-01592-BKC-TCB,
84-01593-BKC-TCB,
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, ET AL., DEBTORS

CERTIFICATE OF INDEBTEDNESS
OF ________________________, TRUSTEE

For value received ______________, as Trustee (the "Trustee") of the Miami Center Liquidating Trust (the "Trust"), under the Consolidated Plan of The Bank of New York, dated February 26, 1985, as amended by First Amendment to Plan, dated March 22, 1985, and as amended by Second Amendment to Plan, dated July 30, 1985, (the "Plan"), promises to pay to the order of THE BANK OF NEW YORK, at its office at 48 Wall Street, New York, New York 10005 ("BNY") the sum of ________ ($_______________), together with interest thereon from the date hereof to the date of payment at BNY's Prime Rate plus one percent (1%) per annum. "Prime Rate" shall mean the prime commercial lending rate of The Bank of New York as publicly announced to be in effect from time to time, such rate to be adjusted on and as of the effective date of any change in the Prime Rate. Such Prime Rate is

not necessarily the lowest lending rate offered by BNY to its customers from time to time. All interest based on the Prime Rate shall be calculated on the basis of a 360 day year for the actual number of days elapsed. Principal and accrued interest thereon shall be paid as and when funds are available to the Trustee from the liquidation of the debtors' estates.

Unless otherwise defined herein all capitalized terms used in this Certificate shall have the meaning set forth in the Plan.

This Certificate of Indebtedness is the Trustee's Certificate referred to in, and is issued pursuant to, the Plan and the Funding Agreement, and has been issued pursuant to the Order of Confirmation, dated __________.

The obligation of the Trustee under this Certificate is a Class 1 Claim and is entitled to priority in payment under Code Section 507 over all other claims, except (i) Class 1 Claims that have been paid or allowed prior to the date hereof and (ii) Allowed Class 2 through Class 6 Claims that were filed on or before January 15, 1985, together with allowed Trustee's fees and expenses.

In order to secure the obligations of the Trustee under this Certificate and to provide BNY with adequate protection, the Trustee, on behalf of the Trust, grants to BNY a first lien and security interest in all of the Trust Property and proceeds thereof, including without limitation all right, title and interest of the Trustee in the Award, in MCJV, and the proceeds thereof. The Trustee agrees to execute all such security agreements, financing statements, or other instruments as may be reasonably required by BNY in order to evidence or perfect such lien and security interest.

This Certificate shall be binding upon and inure to the benefit of the respective successors and assigns of each of the parties, including a Trustee in a superseding Chapter 7 case.

This Certificate shall be governed by and construed in accordance with the laws of the State of Florida and the Code.

In witness whereof, the Trustee has executed this Certificate on this _____ day of _____, 19___.

MIAMI CENTER
LIQUIDATING TRUST

By: ________________________
Trustee

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
JUDGE SIDNEY M. WEAVER

No. 84-01590-BKC-SMW

In the Matter of:

HOLYWELL CORPORATION, ET AL., DEBTORS

No. 87-0627-BKC-SMW-A

FRED STANTON SMITH, PLAINTIFF

vs.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS.

MOTION FOR AN ORDER REQUIRING COMPLIANCE BY THE DEBTORS WITH SECTION VIII OF THE AMENDED CONSOLIDATED PLAN OF REORGANIZATION; MOTION FOR RECONSIDERATION OF COURT'S RULING CONCERNING PRODUCTION OF TAX RETURNS and MOTION FOR RECONSIDERATION OF 2-9-88 ORDER ON MOTIONS.

February 11, 1988

The above-entitled cause came on for hearing before the HONORABLE SIDNEY M. WEAVER, one of the Judges of the UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN DISTRICT OF FLORIDA, at 51 Southwest 1st Avenue, Miami, Dade County, Florida, at a session of said Court on Tuesday, February 11, 1988, commencing at or about 1:00 p.m., and the following proceedings were had:

REPORTED BY: Jaclyn M. Ouellette

APPEARANCES:

HERBERT L. STETTIN, ESQUIRE, AND
PAMELA STETTIN, ESQUIRE,
Attorneys for the Liquidating Trustee,
Fred Stanton Smith.

COLL, DAVIDSON, CARTER, SALTER & BARKETT, BY
FRANCIS L. CARTER, ESQUIRE, AND
JANIE ANDERSON, ESQUIRE, AND
KIRKPATRICK & LOCKHART, BY
S. HARVEY ZIEGLER, ESQUIRE, AND
TOM NOONE, ESQUIRE,
Attorneys for The Bank of New York.

STEARNS, WEAVER, MILLER, WEISSLER, ALHADEFF & SITTERSON, BY
KEVIN ORR, ESQUIRE, AND
ROBERT MUSSELMAN, ESQUIRE,
Attorneys for Corporate Debtors.

UNITED STATES DEPARTMENT OF JUSTICE, BY
FRANK DELEON, ESQUIRE, AND
TERRY MITCHELL, ESQUIRE,
Attorneys for Internal Revenue Service.

KOZYAK, TROPIN & THROCKMORTON, BY
JOHN W. KOZYAK, ESQUIRE,
Attorneys for O&Y.

ALSO PRESENT:

THEODORE B. GOULD, IN PROPER PERSON.

FRED STANTON SMITH, LIQUIDATING TRUSTEE.

WITNESSES:

EXHIBITS:

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[4] THE COURT: Yes, sir.

MR. STETTIN: Your Honor, you have two matters set on the 1 O'clock calendar. One of them is relatively brief. The other one is the adversary.

With your permission, I think we ought to take the relatively brief one. We can dispose of that.

THE COURT: I have also put some more motions on the calendar that were pending and I felt we might as well dispose of them today. Motion for Reconsideration of Court's Ruling Concerning Production of Tax Return, Motion For Reconsideration of 2-9 Order On Pending Motions. Mr. Mark filed that.

I am not sure that these people got notice of them being on the calendar today. They should have. Telephone notice was given by the Clerk's Office for these people.

MR. STETTIN: We did not receive notice of either one of those being on. I will tell you that Mr. Edelman and Mr. Kozyak filed one of those motions and I don't see him here.

MR. ZIEGLER: We reached an agreement on that this morning. I spoke to Mr. Edelman on the telephone and nothing is going to come up in the adversary that disturbs either of us, so that motion can be taken off to see if it ever has to be addressed.

[5] THE COURT: Well, of course, the Court tries to accommodate lawyers and other people, who just walked out of the courtroom, but I frown on people who take advantage of the Court to the extent that they say, Judge, can we get this on an expedited manner. Sure, I will do it, and then they don't show up.

MR. ZIEGLER: Mr. Edelman was in New York, in deference to him.

THE COURT: I don't care if he is on the moon. He was available for framing that motion.

MR. ZIEGLER: I am on the other side, Your Honor.

THE COURT: I know you are.

MR. GOULD: Your Honor, Mr. Edelman called me and informed me that the bank had in fact agreed to accept the K-1 provided by the joint venture for me, and I said under those circumstances, that it didn't appear to me worth while to waste the Court's time in dealing with some emergency motions for reconsideration.

THE COURT: Well, that's good, and that is probably a practical solution, but you would be surprised how many times a practical solution turns into trauma and we lose motions in the cracks and people say, Judge, you never heard this and we never reached an agreement, so therefore the policy of the Court, and [6] Kozyak's firm knows this and I will deal with Mr. Kozyak, is that when you ask for something as a special favor, great, the Judge will usually give it to you, but certainly be professional enough to appear in Court and tell him on your own accord, not through third parties, that you are in accord. Judge, this can be removed because it has been resolved, and Mr. Kozyak and Mr. Edelman, whoever he is—is he with Kozyak's firm?

MR. STETTIN: No, he is a New York lawyer. Mr. Kozyak appears as local counsel for their joint client.

THE COURT: I don't know anything about that.

Anyway, Kozyak filed the papers and I will have to deal with him. I don't say that vengefully. I am just making a statement.

How about the motion for reconsideration of the 2-9 order on pending motions by Mr. Mark?

MR. MUSSELMAN: Your Honor?

THE COURT: Again, a courtesy to get this on the calendar on an expedited basis.

MR. MUSSELMAN: Mr. Mark is out of town. Mr. Orr from his office was here a few minutes ago, but as lead

counsel, perhaps Your Honor will permit me to address the matter with Mr. Orr's absence?

[7] THE COURT: Do you know enough about it, counselor?

MR. MUSSELMAN: I think so.

THE COURT: I am not disputing your knowledge, but do you know enough about this motion to present it?

MR. MUSSELMAN: I believe so, Your Honor.

THE COURT: All right, sir. Let's proceed.

MR. MUSSELMAN: This is a motion requesting the Court's further consideration of the decision reached on Tuesday, I believe it was, where Your Honor granted and denied a whole group of motions that most of which we had not realized would be on the calendar for that day.

The particular request for reconsideration brings us to the objection by the discharged debtors to many of the points that were in the original thing on the basis that under the Bankruptcy Code, we believe that the matters addressed here are strictly post-confirmation and not within the scope of the continued jurisdiction of this Court.

That is our basic problem here. It's a problem that has run through many of these hearings and it maybe that Your Honor feels he has already addressed it adequately, but it is a matter we feel of very great [8] importance.

Of course, the whole status of this case has gotten terribly confused.

MR. MUSSELMAN: Yes, Your Honor.

It is particularly confused in the fact that the order of confirmation, which is what everyone seems to be relying on, was specifically reversed by Judge Atkins so that we have a case where the order of confirmation was affirmed by Judge Aronovitz and reversed in express terms by Judge Atkins, and this creates a problem and it runs through everything else that we do.

THE COURT: Counsel?

MR. STETTIN: Your Honor, I did not realize we were going to be doing Genesis again.

Why are we back at the very beginning of this case?

The motion addresses an order you entered on the 9th and says in support of it that it should not have been granted because this Court lacks jurisdiction over the entire controversy, and you have already passed on that several times; the order directs the production [9] of documents that have no bearing on the present controversy, you passed on that directly and specifically, Mr. Keven Orr argued that directly before you on the 9th; and third, the order does not give them enough time.

In fact, they have partially complied with it by sending some documents. They have not complied completely by sending all of them.

I will tell you that we are prepared to go forward with the adversary today even with the incomplete production and will deal with the need for more production if needed, but on its merits, the motion for reconsideration ought to be denied.

THE COURT: Denied.

MR. STETTIN: The next one, Judge, is the –

MR. GOULD: Have you denied it, Your Honor?

THE COURT: Yes, sir.

MR. GOULD: Fine. Thank you.

MR. STETTIN: The next one is the motion which was filed by the liquidating trustee for an order requiring compliance by the Debtors with Section VIII of the Amended Consolidated Plan Of Recognition.

The motion itself was filed February 3rd. I have not received a response formally other than the [10] letter which is attached to the motion.

The motion asks that the Court require the debtors to provide the cooperation which the plan absolutely requires

of them, and Section VIII of the plan,it says that commencing on the effective date and thereafter, the debtors are to devote such time and attention to the affairs of the estates as are necessary to carry out the provisions of the plan and with the reasonable requests of the trustee, and among the things that they are required to do is to cooperate fully with the trustee and give the trustee access to and permit the trustee to copy all financial statements, tax returns, books and records of every kind as are within the possession, custody and control of the debtors regarding objections to claims against the estate, with a view toward the prompt determination of the objections and a prompt consummation of the plan.

It happens to have direct relevance to the problem that we have got today, and that is the question of whether or not the liquidating trust has any obligations at all concerning income taxes. We need to have complete records, one way or the other.

We sent a letter – I did – I sent a letter on December 31st, 1987, to Mr. Gould, directed to him both individually and as an officer, stockholder and [11] controlling party of each of the debtors, asking for six categories of documents, and I concluded by saying the information is sought pursuant to the continuing obligation of the debtors to provide financial information and to take all actions requested by the trustee, which he deems appropriate to implement and perform the plan.

He responded within a week in which he said, among other things, that he wasn't going to comply; that the Court lacked jurisdiction over him, these matters were no longer subject to any control by the liquidating trustee, and he would not comply.

His letter is attached to the motion. I don't mean to paraphrase it but I believe that is the thrust of it. He won't comply and he has consistently taken the position, neither

this Court nor any other Court in this District, nor the liquidating trustee, least of all, has any authority over him.

He is wrong and the Court ought to order him to comply.

MR. GOULD: Mr. Stettin is the first person in this proceeding who has accused Holywell, myself and the Miami Center Limited partnership of not cooperating under Article VIII or not cooperating with the trustee. [12] He read Article VIII to you him. Financial records have in fact been provided to the trustee and those records are specifically related to the resolution of claims. We not only provided all the the records, we segregated the records that were down here in Miami and they were given the opportunity to go through all of the books and records in Charlottsville, Virginia.

Mr. Stettin is continuing this process as one of harassment. I don't have anymore patience for it.

I have nothing to give Mr. Stettin that is available at the present time.

MR. STETTIN: For Mr. Gould to say that he does not have the documents, leave aside his gratuitous –

MR. GOULD: That's not what I said. Jesus, I have got to leave this place.

THE COURT: Sit down, Mr. Gould.

Proceed.

MR. STETTIN: I don't want to misquote him, Judge. If the reporter would simply read back his very last sentence, we can resolve this.

THE COURT: All right, read it back, Ms. Reporter.

[13] (Whereupon, the sentence referred to was read back by the Court Reporter.)

MR. STETTIN: Let me read you some of the categories of documents that I had asked for. The location

and person in control of the corporate stock of each of the subsidary companies of Holywell Corporation. He can tell me whether or not he knows where they are. He knows where they are, Judge.

Current financial statements which schedule all of the assets and liabilities for each of the subsidiary corporations of Holywell Corporation, the most recent operating statements for each of the subsidiary corporations of Holywell Corporation.

Please keep in mind, Judge, they have a full time financial officer who works for Holywell Corporation named Edgar Shomaker, whose job it is to handle the financial affairs of these companies.

Four, a description of each asset owned by the subsidiary corporations of Holywell Corporation, including each bank account, certificate of deposit or other evidence of indebtedness due the subsidiary company.

Five, a statement of all your assets and liabilities including the name and address of each bank account or other evidence of indebtedness due you.

[14] Six, the disposition of the settlement proceeds received by Holywell Telecommunications Company from a case that lately pended in the Circuit Court in Dade County. I know personally that they got $485,000 in cash no earlier than November of 1987. I would just like to know the disposition of it, since it is owned by a wholly-owned subsidiary of Holywell.

I don't accept and I don't think the Court should accept Mr. Gould's statement that he has nothing that he can or will make available to the trustee.

MR. GOULD: At closing, the trustee was given by the Bank of New York all certificates of all the subsidiaries that have been previously issued, including Holywell checks. They were at the same time given all the financial statements prepared by Touche Ross.

They have been given the 1983, 1984, 1985 tax returns and those tax returns are consolidated returns with balance sheet for each individual subsidiary. Touch Ross' financial statements for 1983 and 1984 for the Miami Center Limited Partnership and Chopin Associates, the tax returns for Chopin Associates, also shows the information that was requested by Mr. Stettin.

Now, if Mr. Stettin's is asking for my bank [15] accounts now, for my personal bank accounts now, I do not think that I am within Mr. Stettin's purview. I do not think Mr. Stettin continues to control my conduct as a discharged debtor.

If you are going to say to me that I am not a discharged debtor, I will provide the information to Mr. Stettin. If you say that you propose to revoke, as I understand you suggested, the discharge of the debtors, if that is feasible under the Code, please do it and I will provide the information to Mr. Stettin, but the only thing that Mr. Stettin is requesting that he does not have is, one, my personal bank account, and, two—excuse me, three things—two, my returns for 1983 and 1984, 1985 and 1986. There is a specific reason for that. Those returns have to be adjusted for 1985.

Three, the disposition of an asset of a non-filed affiliated company of a discharged debtor, Holywell Corporation.

If you are saying that Holywell Corporation has not been discharged, then I will also provide him with that information.

MR. STETTIN: I have only one comment, Judge. Mr. Gould seems to believe that from and after the time of confirmation, he has no continuing obligation at all to provide current financial [16] information or otherwise. I think he is wrong. I think this Court has already deter-

mined that in a number of other instances. This is simply one more instance.

THE COURT: Your position on Mr. Gould being a discharged debtor, of course, is he is a discharged debtor.

MR. STETTIN: Yes, sir.

THE COURT: Apparently the word got back to you, Mr. Gould, as I would expect it to, you have attorneys and they report back to you, I had no idea that this motion to comply, to require compliance was on the calendar for today. I don't have the luxury of reviewing my calendars for a week in advance.

I made the observation the other day, based upon the numerous hearings that we have and the reluctance of cooperation from all parties, and I say that all inclusive, perhaps I should restrict it to some parties, to comply so we can get this case on the road.

It seems to me that there is a provision or might be a provision, and I don't know if it has ever been tested or not, that if there is a provision within the plan itself, a confirmed plan, for compliance so that this matter can be wrapped up, that failure to comply by a discharged person might result in a revocation of that discharge. I don't know if it does [17] or not. This was my remark the other day in Court and I had no idea that this motion was going to be on the calendar today.

I would say so that we can proceed with the matter that primarily confronts us, with an aside to Mr. Kozyak in a moment, that pursuant to the provision of the appropriate named numbered article that you recited in Court today, persons which are effected by this article will cooperate with other parties as appropriate, so that this case might be concluded as expeditiously as possible.

Now, we get into a situation, failure to do that results in a violation or disobedience of a Court order, and then of course we have a new ballgame.

Draw that.

MR. STETTIN: I will, sir.

THE COURT: Mr. Kozyak?

MR. KOZYAK: I apologize for being late.

MR. STETTIN: Excuse me for just one second.

Would you set a time limit within which compliance should occur so we have a date from which we can act?

THE COURT: Let's use the word forthwith as to all future requirements. I can not set a date today [18] for something that might come up later down the line. Forthwith.

MR. STETTIN: Yes, sir.

MR. GOULD: Your Honor, I believe that we have complied.

THE COURT: Mr. Gould–

MR. GOULD: I have fully complied.

THE COURT: I am not holding you in contempt of the Court's order. I'm just making a general statement.

MR. GOULD: I want you to know, we have complied with Article VIII of the plan of reorganization.

THE COURT: Okay.

MR. STETTIN: Respectfully, he has not.

THE COURT: This is not before the Court today. This is just a matter that the Court is going to set a policy.

You have to recognize, people, that you folks have been discussing this case for a number of years. I have been listening to discussions for a relatively short time.

THE COURT: Mr. Kozyak?

MR. KOZYAK: Your Honor, I was not here forthwith and I apologize.

[19] THE COURT: Mr. Kozyak, the Court has to impose the same type of a situation on you that it would for somebody else coming in.

MR. KOZYAK: I am familiar with the Court's penalty.

THE COURT: You have a favorite charity, of course.

MR. KOZYAK: I have developed several since I started appearing before this Court.

THE COURT: Right. Well, you have diversified your activities and I give you credit.

MR. KOZYAK: I am diversified.

THE COURT: Send $15 to your favorite charity with a copy of the transmittal letter to me.

MR. KOZYAK: I have it in my briefcase. Thank you, Your Honor.

THE COURT: Now, in regard to your motion for reconsideration of the Court's ruling concerning the production of tax returns, Mr. Ziegler said, Judge, we have resolved this.

I said, fine, I am glad, but the policy of the Court, and I am really taking up your time and my time of repeating what I said previously, is that if the Court gives you the courtesy of putting it on the calendar on an expedited basis, then I expect for you to [20] reciprocate with the courtesy of showing up and saying, Judge, we have resolved this.

MR. KOZYAK: Absolutely, I do apologize.

It's not an excuse but I was waiting for this proposed order to be run off and I should not have waited. Mr. Ziegler and I have and will be submitting an order.

THE COURT: Just come into Court and say, Judge, we have resolved that. I would accept your word.

MR. KOZYAK: Thank you.

THE COURT: Would you draw me an order, then, John?

MR. KOZYAK: I have it but I will need to revise it just a little to satisfy Mr. Ziegler.

THE COURT: The effect is that you will withdraw it?

MR. KOZYAK: It's dismissed as moot.

THE COURT: Dismissed as moot?

MR. KOZYAK: Yes, sir.

THE COURT: Mr. Stettin, would you be kind enough to draw me the order on the reconsideration?

MR. STETTIN: I will.

THE COURT: As to the motion for an order requiring compliance, the Court would deny that without prejudice and with the general order requiring [21] compliance by all parties effected under Article VIII or VI, whatever it is.

MR. STETTIN: Article VIII.

THE COURT: It was a Section 8 in the service, wasn't it, Mr. Carter?

MR. CARTER: Your Honor, I understand that some people were discharged under that section, yes, sir.

THE COURT: I wondered if you would remember, or by the very nature of the article, you do not remember.

(Laughter.)

THE COURT: All right, then, Let's proceed.

MR. STETTIN: Yes, sir.

Your Honor, the matter which was scheduled for today is the adversary complaint filed by the trustee, Adversary Number 87-9627. It's commonly known among all of the participants in this proceeding as the tax adversary.

This is an adversary proceeding brought by the trustee to determine several issues.

First, whether or not the estate, that is the liquidating trust, has any obligation to file tax returns for income which it received during the pendency [22] of these proceedings and, second, if it does, whether it has the obligation to pay tax. If it does, to determine the amount of that tax.

The named defendants in this case are the debtors; we contend that they are obligated to file and to pay the tax; The United States of America, through the Internal Revenue Service, and the Bank of New York.

The reason the Bank of New York is named is very specific. They were the proponent of the amended con-

solidated plan of reorganization, they were the major influence behind its having been accepted by the Court, they issued an indemnification to the trustee at the time of the conveyance by the trustee of the trust interest in the Miami Center property, agreeing to indemnify him as a result of any claims that might arise from him doing so, and there may be some tax liability, we think not, but there may be some tax liability from that transaction.

In addition, we have also added a claim in there that if there is any tax liability, it is in fact the result of wrongful acts on the part of the Bank of New York since they were the proponent of the plan, they did prepare and circulate the disclosure statement, and both of those documents did not take into account, simply did not raise the question of whether there was [23] and, if so, how much, tax liability as a result of the transactions involved.

With the Court's permission, I am going to give you a very brief overview of the issues that make this dispute.

THE COURT: Will you include the tax years that we are talking about?

MR. STETTIN: I am going to now.

THE COURT: All right.

MR. STETTIN: The debtors filed their petitions I believe in August of 1984. Just before they filed, one or more of the debtors had enterd into contracts to sell property which they had an interest in and which another wholly-owned non-filed subsidiary called Twin Development Corporation had an interest in located in the Washington, D.C. area.

Everyone refers to it familiarly as the Washington proceeds, sale from Washington property.

The debtors, as debtors in possession, asked the Bankruptcy Court during the pendency of the Chapter 11 proceedings for permission to complete that sale. Permission to complete that sale. Permission was granted. The sales were completed partially in December of 1984, partially in January of 1985.

The order which Judge Britton entered [24] authorizing the completion of the sales which were payable to the debtors and to Twin Development corporation, wholly-owned non-filed subsidiary of Holywell Corporation, would be brought down and kept in a separate bank account or bank accounts, in the nature of certificates of deposit or treasury bills or something like that, subject to the further order of the Court.

The Bank of New York thereafter, on motion, obtained an order saying that those accounts were subject to a cash collateral lien in favor of the Bank of New York. Thereafter, the Bank of New York proposed a plan of reorganization which included in part the use of those Washington proceeds, including the portion of them that were owned and attributable to the debtors – I think they were Holywell Corporation and Mr. Gould invidually – as well as the portion of those Washington proceeds which were the property of Twin Development Corporation, as its share of that sale.

The disclosure statement said that. The Internal Revenue Service was a party to these proceedings. They had prepetition claims.

I would assume in the ordinary course, and I don't think they'll deny this, that they received a copy of the proposed plan of reorganization and the [25] disclosure statement. Neither the plan nor the disclosure statement said anything at all about the payment of income taxes which might come due as a result of that sale, the Washington proceeds.

In fact, the Internal Revenue Service not only was a prepetition creditor but attempted to assert additional claims during the pendency of the Chapter 11 proceedings. Those

claims were late filed, they were beyond the bar date and were striken by Judge Britton.

It happens that that order was affirmed on appeal and there is presently pending a notice of appeal in the Eleventh Circuit by the Internal Revenue Service. Those claims have nothing to do with these claims for arising out of the Washington proceeds.

The plan also provided another use of funds which directly affects today's proceedings. The plan said that they were going to sell the Miami Center property for $255,600,000, the amount that it had been appraised at in an M.A.I. appraisal. It would be sold to the Bank of New York or its nominees.

No provision was made in the plan or in the disclosure statement for any income taxes that would become due, if any were to be become due, and payable to the Internal Revenue Service as a result of this sale. The Internal Revenue Service received a copy of this [26] plan and this disclosure statement.

The order of confirmation of that plan of arrangement was entered. It was appealed. Judge Aronovitz sent it back for findings and conclusions.

On remand, it was again confirmed and as confirmed on remand, was again appealed. This time it was affirmed, and you will recall, of course, that the Eleventh Circuit has since dismissed that appeal because the plan was substantially consummated.

The substantial consummation arose in the following manner. When the plan became effective, there was a brief period of time after the order of confirmation was entered, during which a stay remained in effect. The Debtor did not post a supersedeas which the Bankruptcy Court and later the District Court modified, had scheduled.

The plan became effective, I believe the date was October 10, 1985. The liquidating trustee, named by the

Court as a result of the order of confirmation to operate the liquidating trust, took over on October 10th. Almost instantly, he attended the closing and conveyed the estate's interest, the liquidating trust's interest in this property to the Bank of New York's nominee.

He did not operate the property at any [27] time. He did not engage in the business of operating the hotel or the office building or any of the other properties. He simply executed the instruments of conveyance on behalf of the liquidating trust and received the net proceeds, some of which were put into an escrow account at Holland & Knight concerning the ad valorem taxes you will recall we had discussions about recently, and some were simply conveyed to him and placed in bank accounts in his name.

The Washington proceeds were also placed in bank accounts. I think they may have been in the form of certificates of deposits or treasury bills, but they were in fact held to be used for the purposes of the plan.

Shortly thereafter, toward the end of 1985, beginning of 1986, the trustee began paying off all of the creditors. To do that, he issued instructions to I think it was Florida National Bank where these funds were kept, saying I want you to you honor these checks that I am going to be drawing to all of these creditors.

Mr. Gould objected and said to the bank, to Florida National, you don't honor the checks drawn which are going to be paid against the Twin Development proceeds, the Washington sale proceeds. They are not the property of the liquidating trust.

[28] An emergency hearing was brought by Mr. Wolff, who was then representing the liquidating trust to determining this and have Mr. Gould held in contempt for interferring in the administration of the liquidating trust.

Judge Britton entered an order in which he said the monies all belong to the liquidating trust. Mr. Gould, you have no authority over them.

That order was appealed. Judge Ryskamp affirmed that order, finding that the debtor had been equitably estopped from denying this because in its own pleadings filed with the Court, it had said all these monies would be used to pay the creditors of Holywell and its affiliates.

Remember, please, that there was an order of substantive consolidation of all of the debtors that had been entered.

That order from Judge Ryskamp, just to bring you up to date, was appealed to the Eleventh Circuit, oral argument was held approximately two weeks ago.

There have been a number of payments made to creditors in various classes, and a number of reserves set up to cover those which remain disputed or unliquidated or both.

[29] When I began representing the liquidating trustee, we had a number of claims which had been asserted, and which were being litigated in various courts. Some in the Circuit Court. A great many in the Circuit Court, as a matter of fact. Many had been paid. Most had been paid, as a matter of fact. That was the basis for the Eleventh Circuit's finding of substantial consummation.

It became very clearly apparent to me that no provision for the payment of income taxes had been made. We were getting more and more concerned that the Internal Revenue Service would take the position that they had some right, which we dispute, to some or all of these funds which the liquidating trustee has.

I began consistently to take the position in front of you that while orders could be entered determining fees and costs and allowing claims and ordering them to be paid, none should be paid until we had this determination. You can not half determine who the creditors entitled to share in this estate are.

At the suggestion of a great many of the people and at your urging, I think at one time at your direction, I filed this adversary to have this issue finally and completely determined. I know it will be appealed, Judge, I am not innocent about that. [30] Everything else is, this one will be, but we need to get it resolved.

The issues in this case as I understand it from a conference with the Justice Department's attorneys, representing the I.R.S., Mr. DeLeon, and from conferences with our accountants, are as follows.

The I.R.S. I believe takes the position that there are two bases on which the liquidating trust is obligated to file a tax return and pay a tax.

The first is Title 26, Section 6012(B)3 and B4. That is in the Internal Revenue Code. This is the one which says that receivers – well, I will quote it:

> "In a case where a receiver, trustee in a case under Title 11 of the United States Code or assignee by order of Court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such corporation or business is being operated, such receiver, trustee or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns."

Basically, as I understand this section, it [31] simply requires the bankruptcy trustee, non-bankruptcy receiver since there are no more receivers under the Code, and assignees for corporations responsible for the payment of the reporting of income, the filing of a return, and the payment of tax, just as if they were regular ordinary businessmen engaged in the operation of a business.

Parenthetically,the liquidating trustee's position is very simple, and we will have testimony to present to the Court

on this issue. We are certainly not a receiver. No one suggests that we are. We are not a trustee in a case under Title 11 of the United States Code and no one has ever suggested before in any pleading or in any argument to this Court that we are.

We are a liquidating trustee of a liquidating trust established in a plan of reorganization made part of this case by an order of confirmation. We are not an assignee, and there are cases which directly deal with the question of whether a liquidating trustee in a bankruptcy setting has any obligations under this Internal Revenue Code section.

Sub 4 says that returns shall be made by fiduciaries and receivers and 4 says returns of estates and trusts. Clearly we are not an estate. They mean probate estate.

> [32] "Returns of an estate, a trust or an estate of an individual under Chapter 7 or 11 of Title 11 of the United States Code shall be made by the fiduciary thereof."

We are not a bankruptcy trustee. We are not liable to file or to pay the tax.

The debtors have consistently taken that position. There is correspondence, there are statements made to their accountants as well as to the accountants for the liquidating trustee where they have taken that position.

In fact, they went further. They acted on it. They filed tax returns, one or more of the debtors did, in which they picked up the income of the trust because there were two types of income. The first was the proceeds from the sale of the Washington property and the Miami Center property, and the second was the income earned by these monies being in the bank or certificates of deposit or treasury bills. That is the interest income.

The debtors picked up all that interest income and reported it on tax returns that they filed except the last

one. They have now said that they won't file it and they won't be responsible for the tax.

THE COURT: Who has done that among the [33] debtors?

MR. STETTIN: Mr. Gould on behalf of himself, as well as Holywell Corporation has said that on a number of occasions in the last couple of months and written a letter saying that they will not file the most recent tax return.

The basis for the claim of liability by the Government is Title 31, Section 3713, sub A-1, which I really don't think is a basis for the claim but rather the order of priority of payment.

> "The United States Government shall be paid first when, A, a person indebted to the government is insolvent and, B"—
>
> Pardon me, it is sub one.
>
> "The debtor without enough property to pay all debts makes a voluntary assignment of property. 2, property of the Debtor, if absent, is attached or, 3, an act of bankruptcy is committed, or, 4"—

And then it refers to deceased debtors, not applicable here.

Subsection two in that section is very clear. It says this subsection does not apply to a case under Title 11. I read that clearly to mean that it exempts bankruptcy proceedings, and there is a logical [34] reason from our perspective, and that is that the taxation of bankruptcy estates is clearly controlled and covered by Section 6012(B)3 which expressly deals with it, as well as by the Bankruptcy Code itself. It simply is not applicable.

There are a number of cases which have addressed this issue. We believe that they support the position of the trustee.

Our opening statement will be we'll have the attorneys, pardon me, the accountants for the liquidating trust who will testify that the Debtor did not turn over its prepetition nor its post-petition books and records, they retain them and they keep them and they use them, they continue, they are discharged debtors. They have every expectation that they will continue in existence when this plan is completed and these proceedings are dismissed.

They have a full time financial officer, Edgar Shomaker, who continues to work for them. They keep their own books and records.

We set up books on a cash basis. That is, to reflect receipts and disbursements of money for the purposes of the liquidating trust and reports have been filed with the Court prepared by the accountants for the liquidating trust.

[35] In one of those reports, the evidence will show, it's the second one, a reserve was established in an excess of caution at the request of Mr. Wolff to show a potential that there might be some tax due. This was on the interest income.

The debtor filed objections to that report and said clearly, there is no tax due. We pay the tax. The liquidating trust does not. It is not a taxable entity.

THE COURT: Who said that?

MR. STETTIN: Mr. Gould, his lawyers. Fred Kent filed that motion.

THE COURT: All right.

MR. STETTIN: There will also be testimony from the accounts for the debtors, Touche Ross. They have said in writing the liquidating trust is not a taxable entity, the debtors remain the taxable entities involved and responsible for the filing of reports showing all gains and the payment of taxes on those gains.

The liquidating trustee will testify briefly as to the fact that he is the liquidating trustee and his responsibilities

have never included operating a business. All they have ever been is to hold the proceeds of the liquidating trust, to identify the creditors, to determine their priority and to get them paid pursuant to Court order. That's his job.

THE COURT: You draw a distinction between the terminology turned over and operated?

MR. STETTIN: Yes, sir. The reason I do is because a number of the cases have addressed that, including one I think that you may have been involved in that was called In Re. Cusado Distributors.

THE COURT: That involved wine.

MR. STETTIN: Yes, sir. A beer and wine distributor. It was a Section 960 claim. Another Section which Mr. DeLeon has indicated to me they do not rely upon as a basis for claiming the liability of the liquidating trust to pay taxes.

THE COURT: That was a case in which the Court held that the trustee was not liable for the State of Florida taxes.

MR. STETTIN: The excise taxes on beer and wine.

THE COURT: When it was liquidating an estate.

MR. STETTIN: That's exactly right. He was not operating the business. That is part of the reason that I had anticipated putting on testimony to show there was no business operation, we were simply [37] liquidating, holding and then disbursing to creditors.

The key in this, Judge, and I will stress this repeatedly, is that we are not a trust in the sense that we have a continuing independent existence which will go on forever. That is not true.

The residuary beneficiaries in this case are the debtors. They will get every nickel of everything that is left over and because of that, from the beginning Mr. Gould and his firm, his firms, have always been involved in determining

who should be representing the trust, what defenses should be raised, what settlement should be made, what payments should be made because it was his ultimate money that we were talking about. Anything left was his and we still take that position.

We are going to have a shelf life, a radioactive existence that will be determined. We will in fact end our existence when these claims are paid and everything else goes back to him. He remains the debtors, they remain in existence.

I will tell you that there is one interesting distinction in the tax laws, as I understand it, and that is individual debtors do not have their taxes discharged. Corporate debtors may have their taxes discharged.

[38] Now, you've got some of each in this case. Mr. Gould is an individual debtor and you've got a corporate, one or more corporate debtors as well.

We don't have that dispute. Whether or not the Internal Revenue Service has any rights left against Mr. Gould is not our fight.

There will also be some testimony, Judge, I anticipate, concerning transferee liability, and you ought to keep this fact in mind. The I.R.S., it seems to me, will try and argue that the Washington proceeds payable to Twin Development were owed by Twin, the tax liability would be owed by Twin. That is a creditor of Twin, and certainly you have to pay the creditors of the subsidiary before you upstream those monies or dividend them up and then have the parent use it to pay the parent's creditors. It makes sense to me.

The tax liability of Twin for the Washington proceeds is a post-confirmation liability. It didn't arise until the sale had—pardon me, I am wrong on Twin. I take that back.

That is a post-filing liability. It is not a prepetition claim, because the monies didn't come in until after the Chapter 11 proceedings were already in existence.

Our position will be very simple. The [39] Internal Revenue Service knew of the existence of the plan which proposed to use these Washington proceeds to pay creditors of Holywell and the other consolidated debtors and did nothing. They did not object, they did not file objections to the disclosure statement, which failed to state this—the Bank of New York's disclosure statement simply didn't address it. They did not object to the confirmation of the plan and did not appeal it.

We say that they are estopped, and I have got one very good case which walks about estoppel running against the Internal Revenue Service on very similar facts.

The post-confirmation issue that I was addressing before arises from the proceeds from the Miami Center sale. The Miami Center sale occurred on October 10th, which was after confirmation had occurred. Those taxes, if there are any due, are a post-confirmation tax liability.

Our position is very simple. The properties put into the liquidating trust are not to be used for post-confirmation debts, except as expressly provided in the plan, such as administrative expenses, fees and costs. We are not liable for post-confirmation taxes. The debtors may be and they continue in [40] existence. The Bank of New York may be under some theory that the Internal Revenue Service may have, but not us.

Our job is to simply identify and pay creditors from funds which are available to us. Those funds available to us in fact are the Washington proceeds, Miami Center proceeds and the interest which we have earned on those monies, and if necessary, and I have always said this, any other assets which the debtors may have if it becomes necessary to use them.

Thank you, sir.

THE COURT: Government? Who will speak for the Government?

MR. DeLEON: Good afternoon, Your Honor. Frank DeLeon with the Tax Division of the Department of Justice.

THE COURT: Is Miss Koonce involved in this at all?

MS. KOONCE: No, Your Honor, just observing.

MR. DeLEON: Your Honor, after the very complete factual explanation of the trustee, I'll be very brief.

Despite the presence of so many attorneys and so many potential witnesses, I believe that the [41] issues involved in this case are very simple, and that is just who has to file the tax return and who has to pay the taxes.

THE COURT: Did we determine the years, Mr. Stettin, as you promised me?

MR. STETTIN: It would be taxes which would have accrued as a result of a sale of the Washington property partially in 1984 and partially in 1985, and the Miami Center property which was sold in October of 1985.

Keep in mind, Judge, that there are split years because the debtors' tax years are not calendar years. Their tax year is July 31, every year, July 31.

THE COURT: All right.

MR. DeLEON: If I could expand on that. The two years at issue, one of them fiscal year ending July 31st, 1985, which is preconfirmation, the other year is ending July 31st, 1986, which is post-confirmation.

The position of the government in this case is very simple. The trustee, pursuant to the provisions of the plan that was confirmed in this case, is responsible to file a tax return pursuant to the provision of 62(B)3 and 62(B)4.

The evidence that the Government will be [42] presenting to Your Honor will be the plan itself, which will make very clear that a trustee either holds title or has possession of all or substantially all of the assets of the debtors, and is therefore responsible to file those tax returns on behalf of the debtors as contemplated by those provisions that I cited.

Once the trustee is responsible to file the tax returns pursuant to 6012(B)3 and 4, pursuant to Section 6151 of the Internal Revenue Code, he has to pay the taxes.

Also, it is the position of the United States that those taxes are an expense of the administration of the trust and as such have to be paid before the other claims are paid.

MR. STETTIN: I didn't hear the very last thing, have to be paid before?

MR. DeLEON: Pursuant to the plan, as a first priority, whatever priority they are given in the plan.

That is the position of the United States, Your Honor, which is very simple.

THE COURT: Ms. Mitchell, do you have anything to say to that?

MS. MITCHELL: No, Your Honor. Mr. DeLeon is speaking for us.

[43] THE COURT: Counsel?

MR. MUSSLEMAN: Just a couple little corrections of factual matters. The order which Mr. Stettin referred to permitting the use of the Twin proceeds expressly said that it was the net proceeds and that was disregarded in what was thereafter done and the entire proceeds went over.

The original order required that the Twin proceeds be segregated from the Gould and Holywell proceeds, and then in response to the bank's emergency motion the entire amount was transferred after the bank's debt had been paid so that there was no longer any basis for cash collateral. The order was restricted to the net proceeds, nevertheless, the liquidating trustee took all of them.

THE COURT: I imagine that during the course of the trial, I will be furnished with the various orders that you refer to.

MR. MUSSLEMAN: Yes.

THE COURT: All right.

MR. MUSSELMAN: Secondly, to clarify the matter of the filing of the returns, as Mr. Stettin pointed out, Holywell files a consolidated return for itself and its subsidiaries and it files this on the basis of a fiscal year ending July 31st. Accordingly, [44] Holywell filed the last return for the period that ended while it was a Debtor-In-Possession. It did not pay the tax on that return because its assets had since been taken by the liquidating trustee, but it did file a return.

The return for the following year was essentially almost exclusively the transactions of the liquidating trustee and not the transactions of Holywell.

MR. GOULD: I want to clarify a few additional facts.

THE COURT: You want to clarify it further.

MR. GOULD: That's right, since I apparently know more about this than anybody else does.

The funds came from the sale of assets of four partnerships, the Washington proceeds came from the sale of the assets of four partnerships and Twin Development Corporation, along with four additional non-filed subsidiaries of Holywell Corporation.

Only the funds incurring to Holywell and myself were placed—they were placed in three segregated accounts, Holywell, myself, and Twin Development Corporation.

The Bankruptcy Judge, Bankruptcy Judge Britton, did not make a distinction between the funds [45] payable to Holywell and three other subsidiaries because they were only approximately $2,800,000, so Holywell's funds and the funds of four other non-filed subsidiaries were placed in a single account. Those funds were then invested in treasury bills.

On October 10, 1985, the trustee took possession of the funds in my account and Holywell's account. The Miami Center Limited partnership and I file on a calendar basis. Holywell files on a cash basis. It files consolidated returns

mind you, this is consolidated with each individual subsidiary as a separate taxable entity.

Each individual subsidiary has its own balance sheet, as the Internal Revenue Service Code requires, and its own income statement, and then they are merged with Holywell for the purpose of the payment of taxes or alternatively to shelter because of the losses of the parent company.

THE COURT: All right.

MR. GOULD: That's the first point.

The second point is that we concede the Miami Center Liquidating Trust is not a taxable entity, it is not a taxable entity. Mr. Smith is also not a liquidating trustee. He is a trustee appointed by the Court on August 12, 1985, for the Miami Center [46] Liquidating Trust and the trust assets, specific liquidating funds are enumerated in Article IV of the plan, for the payment of the claims of creditors.

Mr. Smith is a fiduciary. The Internal Revenue Service is right, he is a fiduciary in possession of substantially all of the assets of Holywell Corporation and, for that matter, improperly, its non-filed subsidiaries who are not, as you are aware, they're all solvent and not part of this proceedings, and from the very beginning I have objected and no plan, Your Honor, no plan submitted by the debtors has ever offered to use a single penny of Twin's funds for anything but the payment of Holywell's liabilities.

So, any statement of that kind by Mr. Ziegler or Mr. Stettin is misinformed. If it's not misinformed, they know that they are wrong.

Now, I don't think that there is any doubt, you can look at the returns, that Mr. Smith is a fiduciary and he has substantially all of the assets of Holywell Corporation.

Let me tell you, this thing is even more complex than Mr. Stettin has indicated because when they substantively consolidated Holywell Corporation and the Miami Center

Limited Partnership, Chopin Associates, [47] what they did was they substantively consolidated separate taxable entities. Holywell Corporation's books and records were all in Virginia, and most of its income came from Virginia, and the commonwealth of Virginia frowns upon not being paid taxes because somebody down here in Florida has taken all of the assets and refuses to pay the taxes.

Now, what we did, and I want you to know this, too, we had 30 or 40 bookkeepers and accountants when Holywell Corporation and these various partnerships and management companies were in operation. After the plan was confirmed, we were reduced to three bookkeepers, so we filed the July 31st, 1984 return and there were no taxes payable because the losses from the Miami Center Limited Partnership sheltered the income of Holywell Corporation and its consolidated subsidiaries, but there was a deferred tax liability of approximately $2,800,000.

On July 31st we then came along and we only had – we filed July 31st, 1985, and that, the income again was sheltered by Holywell's interest, Holywell owned ten units in the Miami Center Limited Partnership, so it was sheltered to the extent that the tax liability was approximately $264,000, and this is the Federal tax liability, approximately $264,000, but the deferred tax [48] liability, approximately $9,700,000, or $9,800,000.

The tax payable to the State of Virginia, July 31st, again, in 1984, no taxes payable because of the shelter, again they are deferred as of July 31st, 1985, except to the extent of approximately $93,000, and now we come to July 31st, 1986. The trustee has taken possession of approximately $32 million in cash. $16,700,000 of that cash is from the non-filed companies, and the $30 million or so, $32 million, includes $1,600,000 in interest income that has not been reported because Holywell is on a cash basis.

Now, I acknowledge that the return has to be filed on behalf of the debtors or the discharged debtors. In this case the return has to be filed just as the Code says, on behalf of Holywell Corporation, a return has to be filed on behalf of Chopin Associates, Miami Center Limited Partnership, and I have filed a return myself.

We have not, contrary to what Mr. Stettin has said, reported all of the interest income. We only reported, I originally reported the interest income applicable to my assets.

He has $17 million in cash in the trust. That cash is fundamentally the assets of the non-filed companies.

[49] Remember, again, July 31st, 1985, Holywell filed a tax return as they have periodically since Holywell's incorporation, and each individual subsidiary's balance sheet shows specific assets and liabilities.

The interest income that has been earned by the trust is all interest income of those subsidiaries. Those subsidiaries are jointly and severally liable with Holywell Corporation for the payment of their taxes, but Mr. Smith is in possession of all of their assets.

Now, I don't quite understand how somebody can sit there and take $2 million in interest income and say he is not a taxable entity, I agree with that, but then say I am not going to pay the taxes. I don't understand how somebody can take $32 million of profits of a group of companies, take them into his possession, use them, and say he is not going to adhere to the Code.

There is an interesting case called I.J. Knight (phonetic). Another one called Sapphire Steamship Lines (phonetic).

It doesn't refer to the issue of operating trustees. It refers to the issue of non-operating trustees.

I am not saying Mr. Smith operates Holywell Corporation. He doesn't operate Holywell [50] Telecommunications. He is a non-operating trustee and a fiduciary.

Where is the money going to come from for payment of the taxes?

He is sitting there holding it. He is earning interest income on it.

I am a simple businessman and a farmer, and I also have a reasonably good education, okay, I also have a reasonably good education, and I have deferred taxes for a long time sheltering it, and I will tell you that some aspects of the Code as they were passed apply specifically to things that I did to shelter income, but there is a time when the taxes have to be paid and they have to be paid now and I expect them to be paid. The Government does.

Thank you.

MR. CARTER: Good afternoon, Your Honor. Francis Carter for the Bank of New York. With me are Harvey Ziegler and Tom Noone.

I have a feeling that the Court has had about as much clarification as it can stand at the moment, so let me simply say that the Bank of New York understands the trustee's position. If the trustee is liable, he wishes to shift that to us.

With all due respect, we disagree with that [51] position but we think, so that we can get some focus here this afternoon, that we should defer argument on that matter.

We agree with the trustee's position that the trustee is not liable, that the debtors are liable to file returns and to pay the taxes, and we would reserve the right to argue the secondary issues only if it's necessary to argue them.

Also, Your Honor, we have filed a reasonably brief memorandum of law with the Court and we hope the Court will consider that.

THE COURT: First witness.

MR. STETTIN: You've heard it. I will simply disagree with a number of the items that Mr. Gould and Mr.

Musselman have stated, but I think it's appropriate during the trial.

MR. GOULD: Can I read something to the Court before the trial begins?

THE COURT: Surely.

MR. GOULD: It's two things. This is a transcript, part of a transcript from July 18, 1985, Pages 98 and 99. This is the substantive consolidation hearing. This is Judge Britton speaking to the Bank of New York and to our counsel. I in fact was not there.

THE COURT: The last point I want to touch [52] on are the tax consequences. In this area, I readily concede that I am a babe in the woods and haven't the foggiest notion of what the tax consequences would be on the particular decision. If a modification of this plan or any other adjustment can be made to eleviate adverse tax consequences for the debtors, then I think that a request for such a modification ought to be respected and honored, and I would so as long as I have the discretion to do so intend to accomplish that result.

"I think that all of us have recognized in our discussion that there might be tax consequences. We are not certain if we have considered all that we could do to eleviate the adverse tax consequences."

As a tax expert, I will tell you there is only one way that can be done and that is by not selling Miami Center Limited Partnership's assets.

The Bankruptcy Court on January 29, 1986, adopted verbatim the findings of fact proposed by the Bank of New York. Page 40 and 41, it says:

> "There has been no evidence to substantiate the debtors' claims that substantive consolidation will somehow cost them approximately $17 million in Federal income taxes."

Now, when you read the bank's memorandum, I think you ought to read it in the light of, one, of their knowledge

that there were adverse tax consequences. Presumably they are sophisticated businessmen, they know that a sale of assets results in tax liabilities.

Secondly, the findings of fact that they induced Judge Britton to adopt verbatim that there was no evidence of a tax liability.

Thank you.

MR. STETTIN: Would Your Honor care to take a short recess? You have been going since 1:00.

THE COURT: Five minutes, please.

(Whereupon, a short recess was had, after which the following proceedings in the foregoing hearing were had:)

THE COURT: First witness, please.

MR. STETTIN: Don Denkhous.

[54] THEREUPON:

DONALD ANDERSON DENKHAUS

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STETTIN:

Q. Please tell us your name and business address?

A. Donald Anderson Denkhaus, D-e-n-k-h-a-u-s, with Arthur Anderson Company, located at One Biscayne Tower, Miami.

Q. What is your occupation?

A. Certified Public Accountant.

Q. How long have you been a CPA in Florida?

A. For 18 years.

Q. Are you certified in any other jurisdiction, sir?

A. No, I am not.

Q. What is your area of specialty in accounting with Arthur Anderson?

A. I am in charge of our accounting and audit practices for South Florida, for the Miami and Fort Lauderdale area.

Q. Are you a partner in the firm?

[55] A. Yes, I am.

Q. Is Arthur Anderson the accounting firm that was retained by the liquidating trustee to handle the accounting functions for the liquidating trust?

A. Yes.

Q. Are you the partner in charge of that particular engagement?

A. Yes, I am.

Q. Tell me what you understand the responsibility of Arthur Anderson is in that engagement?

A. We were assigned as accountants to represent the liquidating trustee in fulfilling his responsibilities, and our initial order didn't specify what the role of accountants would envision, so that role was one that has evolved as time went on, but our primary role was to keep track of the cash receipts that came into the liquidating trust and the disbursement of funds out of the liquidating trust.

Q. To that end, have you set up a set of books for the purpose of reflecting the receipts and disbursements of money in and out of the trust?

A. Yes, we have.

Q. Are those books and records supervised under your control?

A. Yes.

[56] Q. Has the firm of Arthur Anderson assisted the liquidating trustee in filing reports with the Court reflecting the activities of the liquidating trust?

A. Yes, we have.

Q. Was there a report filed with the Court which indicated in any way, that is a report which Arthur Anderson helped prepare, which indicates in any way a reserve

for Federal income tax on the interest income of the monies held by the trust?

A. Yes, there were. I believe there were three reports that we prepared that with the assistance of the liquidating trustee and his counsel at that time, that included reserves, and one of these reserve items includes a reserve for income tax, potential income tax, on the interest earnings of the trust itself.

Q. Let's digress for just a moment.

During the time that Arthur Anderson has been the accountant for the liquidating trust and you have been the partner in charge, have any tax returns been filed by the liquidating trust or the liquidating trustee for his earnings?

A. No returns have been filed.

Q. Have any monies been paid to the I.R.S. for or on behalf of the liquidating trust by the liquidating trust itself?

A. Not directly. Initially, there were some funds that were held, withheld 20 percent withholding on the interest earnings of several of the bank accounts, but there have been no voluntary payments made by the liquidating trustee.

Q. Is that because there was no tax i.d. number and the bank, I think it was Sun Bank, automatically withheld 20 percent of the interest earned?

A. That is correct. They were furnished an i.d. number and discontinued withholding.

Q. I understand. Let me show you this pleading called supplement to debtors' objection to liquidating trustee's second request, apparently signed by Kent, Watts, then the attorneys for the debtors, dated June 9, 1986.

MR. GOULD: Excuse me. We are willing to concede that the trust is not a taxable entity.

The Government is willing to concede that the trust is not a taxable entity; is that correct.

MR. DeLEON: We agree the trust is not a separate taxable entity apart from the corporations, from the Debtor corporations.

MR. STETTIN: Will you agree that the trust is not responsible for the preparation or filing of tax [58] returns for any of the debtors?

MR. DeLEON: No.

MR. STETTIN: Then you had better let me make my case.

MR. GOULD: It is a different issue, but we concede the trust is not a taxable entity.

THE COURT: With that concession, why don't you proceed, then, with your case, for whatever other purpose you care to introduce that. Let's go.

MR. STETTIN: Yes, sir.

BY MR. STETTIN:

Q. Let me show you this document.

Have you ever seen it before, sir?

A. Yes, I have.

Q. If you will turn to   well, let's get it into evidence before testifying.

MR. STETTIN: I will offer it into evidence as the trustee's first numbered exhibit.

THE COURT: No objection, Plaintiff Exhibit Number 1.

(WHEREUPON, the document referred to was marked as PLAINTIFF'S EXHIBIT NUMBER 1 and received into evidence.)

BY MR. STETTIN:

Q. Sir, if you would, was that exhibit [59] prepared by the debtors' lawyers as an objection to certain accountings filed by the liquidating trustee?

A. Yes, it was an objection to the second report filed with the Court.

Q. On the part where the liquidating trustee reflects he had set up a reserve for $500,000 to pay Federal income tax on the interest income of the liquidating trust, what does the Debtor show the liquidating trust should pay as Federal income tax?

A. Zero.

Q. Thank you.

Let me show you this letter which is dated just a few days before that, June 5, 1986. It's addressed from Mr. Clifford G. Benson, Jr. to Mr. Theodore B. Gould, and ask you if you can identify this as a document that you received in the ordinary course of your business on behalf of the liquidating trust?

THE COURT: Is Mr. Benson with Miss Mitchell's group?

MR. STETTIN: No, sir. He is with Touche Ross. They were accountants for some of the debtors.

THE COURT: I try and include you, Miss Mitchell.

MR. STETTIN: Any objection?

[60] MR. GOULD: No.

MR. DeLEON: No.

MR. STETTIN: Without objection, I will offer it into evidence as the Trustee's next exhibit.

(WHEREUPON, the document referred to was marked as PLAINTIFF'S EXHIBIT NUMBER 2 and received into evidence.)

BY MR. STETTIN:

Q. Sir, did you receive a copy of this letter in the ordinary course?

A. Yes, I was not directly copied on it, but I did receive a copy of that letter.

Q. Who was Mr. Benson at that time?

A. Clifford Benson is a tax partner with the accounting firm of Touche Ross.

Q. Who did Touche Ross represent as accountants in this matter?

A. They represent Miami Center Limited Partnership and Holywell Corporation and subsidiaries at that time.

Q. Would you please read the third full paragraph of this letter out loud, sir?

A. "Based upon the above facts, we believe no new taxable entity has been created by the bankruptcy proceeding for M.C.L.P. or Holywell."

[61] "We further believe that the interest earned on the vested funds should be allocated to the taxable entity that contributed those funds. We will insure that this income is included in the tax returns for the entities we prepare."

Q. Thank you, sir.

Let me show you next this letter dated March 11, 1987, on the stationery of Holywell Corporation, which appear to have be sent by Mr. Gould to Irving Wolff, the then attorney for the liquidating trustee, together with a memo that's identified in it the day before, from Mr. Shomaker to Mr. Gould.

MR. DeLEON: No objection.

MR. GOULD: Fine.

MR. STETTIN: Neither party has any objection. We will tender it in evidence as the Plaintiff's next number, which will be three.

THE COURT: Composite?

MR. STETTIN: Yes, sir.

THE COURT: So admitted.

(WHEREUPON, the document referred to was marked as PLAINTIFF'S EXHIBIT NUMBER 3 and received into evidence.)

BY MR. STETTIN:

Q. Sir, did you receive a copy of this letter [62] and the memorandum in the ordinary course of your business on behalf of the liquidating trust?

A. Yes, I did.

Q. I ask you to read out loud the text of the letter of March 11. It's rather short.

A. "Since the Miami Center Liquidating Trust is not a taxable entity, the interest earned on the funds deposited by the liquidating trustee in the certificates of deposits, treasury bills and repurchase agreement has been reported as taxable income in 1985, and in accordance with Edgar Shomaker's attached memorandum, the taxable interest income has been segregated to the account of Twin Development Corporation, Holywell Corporation, Miami Center Limited Partnership and myself. The interest income for 1986 will also be reported separately by each of the above taxable entities."

Q. Sir, to your knowledge, were there any tax returns which were filed by it or on behalf of the M.C.L.P. or Holywell which did indicate as income the interest which had been earned on the monies held by the liquidating trust?

A. We have received copies of the Miami Center Limited Partnership tax return for 1984 and 1985. It is [63] my understanding it includes the interest income but from looking at the tax returns, there is not sufficient information to determine that in the actual tax return.

MR. STETTIN: I have got one further letter agreement which I don't believe the parties have any objection to the admission.

MR. DeLEON: No objection.

MR. GOULD: No.

MR. STETTIN: It's a letter dated March 19, 1987, from Edgar Shomaker, chief financial officer of Holywell Corporation to Fred Smith, concerning interest withheld in 1985.

(WHEREUPON, the document referred to was marked as PLAINTIFF'S EXHIBIT NUMBER 4 and received into evidence.)

BY MR. STETTIN:

Q. Would you please read out loud the third paragraph, the second and third paragraph?

A. "Since the Miami Center liquidating trust is not a taxable entity, all interest earned is allocable to the appropriate debtors and no interest should have been withheld by the bank. The appropriate forms should have been filed to get a refund of the $8,414.98."

"If in fact the trust had a responsibility [64] to file a fiduciary return, which we believe it does not, those returns are done on a calendar year basis. You therefore would have to file at the end of 1985, at the end of 1986. You did not and have not been advised to do so. However, the debtors, as the appropriate taxable entities, have filed tax returns including the 1985 interest income earned.

"It follows, then, that your advisor's internal opinion is that the trust is not a separate taxable entity.

Q. So, the $8,000 or so that he is talking about, is that the money that was withheld by Sun Bank the first time that interest was due to the liquidating trustee?

A. Yes, for failure to file a tax i.d. number.

Q. Was a tax i.d. number filed as a result of that request so that there would be no withholding from that point forward?

A. Yes, it was filed.

Q. In connection with your work as the partner in charge of this account, have you ever seen any evidence in the form of cash flow in or out or reports on operations,

that the liquidating trustee operated in any manner the business activites of the debtors?

[65] No, I have not.

Q. In fact, is it a fair statement, sir, that the only activities of the liquidating trust have been to hold the assets which were designated in the plan for payment of creditors and to identify and determine the amounts and priority of creditors?

A. Yes. The only financial information that we had access to was the cash receipts and expenditures of the funds that were under the control of the liquidating trustee.

MR. STETTIN: Nothing further on direct.

THE COURT: Cross, please.

MR. GOULD: Can I go first?

MR. DeLEON: Go ahead.

CROSS EXAMINATION

BY MR. GOULD:

Q. As Trustee's accountants, have you segregated the assets in your accounting of the various debtors estates including the assets of the non-filed companies, Twin Development Corporation and the other subsidiaries?

A. No, we have not.

Q. Has Touche Ross filed Holywell returns? To your knowledge, has Touche Ross filed Holywell tax [66] returns?

A. They may have at some point in time. They have not filed the recent tax returns.

Q. Touche Ross was not Holywell's tax accountants.

MR. STETTIN: I object and move to strike, if that is a statement, Judge. This is cross examination. He can ask him if he knows.

THE COURT: Please do it.

MR. GOULD: May I see the last exhibit?

BY MR. GOULD:

Q. In the third paragraph of this exhibit, it refers to the trust has a responsibility to file a fiduciary return.

In your opinion, in view of the Internal Revenue Code, which defines a fiduciary as being responsible, as being somebody who has a confidential relationship with the assets, do you believe that that was simply an error?

THE COURT: First of all, let me do this.

Do you agree that the Code, paraphrased, alleges this?

THE WITNESS: Let me remind the Court, my primary responsibility is accounting and audit practices of Arthur Anderson. I am not a tax practitioner and I [67] am not familiar with the exact language contained in the Internal Revenue Code. I use the expertise of my tax department.

MR. GOULD: Then let me introduce an exhibit. We will have you introduce it. Perhaps we could put —

BY MR. GOULD:

Q. Are you familiar with that memorandum?

MR. STETTIN: Before you answer, let me take a look at it.

MR. GOULD: I will give you a copy of it.

THE WITNESS: Yes, I have received a copy of it before.

BY MR. GOULD:

Q. It is a memorandum that was prepared at Mr. Smith's request and with your knowledge concerning the issue of whether or not the Miami Center Liquidating Trust was a taxable entity and was prepared by Holland & Knight.

MR. STETTIN: Objection, the document itself is the best evidence of what its contents are, Judge.

THE COURT: Do you know the answer, sir?

THE WITNESS: Yes.

THE COURT: Answer the question, please.

[68] THE WITNESS: There was concern whether the trust was a taxable entity and that was an internal memorandum prepared by the Holland & Knight tax department on behalf of Irving Wolff and the liquidating trustee regarding tax research into this matter.

BY MR. GOULD:

Q. Does this memorandum define the ordinary duties of a trustee and a fiduciary?

MR. STETTIN: Your Honor, he is asking him the contents of the document. It's not in evidence.

MR. GOULD: I just introduced it.

MR. STETTIN: The rule is still that the Judge makes the ruling on what is in evidence and what is not.

If it's offered, Judge, I object to its admission into evidence.

THE COURT: On what basis?

MR. STETTIN: First of all, it's an internal memorandum between the liquidating trustee and his lawyers and are privileged.

Second of all, this witness has said that he has no tax expertise. He is not the custodian of it. He has got to lay a proper predicate to get it admitted into evidence. This witness has just said that he has seen it. That does not make it admissible into [69] evidence.

THE COURT: Let's visit your objection.

MR. STETTIN: Yes, sir.

THE COURT: It's privileged, why?

MR. STETTIN: Because it was written by Irving Wolff and his firm to his client, Fred Stanton Smith, the liquidating trustee. At that time Irving was the lawyer for Fred.

THE COURT: I understand that.

MR. STETTIN: Second, there has been no proper predicate laid for its admission.

THE COURT: Sustain the objection and rephrase your question, and I will be back in five minutes. I have a matter that I have to take care of.

(Whereupon, a short recess was taken, after which the following proceedings in the foregoing hearing were had:)

THE COURT: Let's proceed.

So, the rephrased question is as follows.

MR. GOULD: Before I rephrase the question, Your Honor, I want to point out to you that the Bank of New York has taken the position that it was not possible to assert accountant-client privilege, attorney-client privilege in this case, in the bankruptcy proceeding, and in fact I believe, as I recall, has cited some case [70] that you previously decided.

MR. STETTIN: But this is an attorney-client privilege.

THE COURT: The other one was an accountant. That is why I asked Mr. Stettin to repeat his objection because I, too, thought that Mr. Stettin had lost his head, but he was asserting the attorney-client privilege.

MR. GOULD: In this particular instance, the document is already in public hands, it's in my hands, in the hands of other people. I don't think that you can assert attorney-client privilege when the document is floating around in the hands of many people.

THE COURT: Why don't you go ahead and ask the question, please.

BY MR. GOULD:

Q. Are you aware of the issue that was defined in this memorandum which defined—which is defined, the trustee is a fiduciary—

MR. STETTIN: Judge, he is reading from a document not in evidence.

MR. GOULD: May I introduce this into evidence?

THE COURT: What is the nature of that? Let's see what it is.

[71] MR. STETTIN: It's a memorandum written by Mr. Wolff, it's a lawyer from Holland & Knight, Richard Wheeler (phonetic), who is writing to his supervising partner at the time, Irving Wolff, concerning the classification of the bankruptcy liquidating liability for Federal income tax.

Something, by the way, Mr. Gould has already acknowledge isn't obligated to file the returns.

Having said that, it is attorney-client privileged. I don't know how he got it and it has not had any predicate laid at all for submission into evidence by this witness.

THE COURT: I would be interested in it, and so for whatever evidentiary value it has, I'll admit it.

(WHEREUPON, the document referred to was marked as DEBTOR'S EXHIBIT A and received into evidence.)

THE COURT: Let's proceed, please.

MR. STETTIN: In order to make sure that our record is complete, I believe the document is hearsay as well. Therefore, I object to its admission on that ground.

THE COURT: I will admit it under the hearsay exception.

[72] MR. CARTER: Which one?

THE COURT: Not for the truth of the matter asserted but the fact that it was stated.

Let's proceed.

BY MR. GOULD:

Q. Is the memorandum an analysis of the issue of whether or not the trustee is a fiduciary under the Internal Revenue Code and Section 7711 of the Internal Revenue Code?

MR. STETTIN: He is referring to Page 3.

THE WITNESS: Yes, that is one of the issues, the issue.

MR. STETTIN: Would Your Honor care to follow along with them and look at the conclusion of the memorandum writer immediately underneath, statement of the issue?

THE COURT: It's in evidence. I can look it over. Let's proceed.

BY MR. GOULD:

Q. Does Page 4 define the term fiduciary under the Code?

A. I can only read what Page 4 has.

Q. It's in evidence. Thank you.

Having read this previously, would you agree that Holland & Knight's conclusion is based upon [73] the assumption on Page 10, at the top of Page 10, that the Trustee's duties are ministerial in nature?

A. My original reading of this document was probably a year and-a-half ago, but reading that particular section that you refer to, that appears to be one of the assumptions that makes up the opinion.

MR. GOULD: I don't have any more questions about this. Thank you very much.

THE COURT: Thank you.

MR. MUSSELMAN: Your Honor?

THE COURT: Let's see if we can get ourselves organized.

MR. MUSSELMAN: I just want to ask one question.

THE COURT: All right, but see if you can't adopt and get together as to the questions so we don't just keep popping up here. I recognize you have the right, but in order to move the case along, see if you can't as a table get yourselves organized.

MR. DeLEON: Your Honor, I don't represent the debtors.

THE COURT: I said see if you can. I didn't commit you, although I might if you don't behave.

(Laughter)

[74] CROSS EXAMINATION

BY MR. MUSSELMAN:

Q. Sir, you said previously that you did not, in the accounting work that you did, segregate the accounts of the different entities.

Can you tell us why that was your policy?

A. Yes. We were instructed by Irving Wolff and his personnel to not segregate the accounts.

When the original monies were received into the trust, there was a transfer of ownership of the individual bank accounts that came in, and those accounts were later consolidated and investments were consolidated and, as recommended by counsel, Mr. Wolff, the liquidating trustees, he believed that the liquidating trust was given a consolidated amount of money and it was not the responsibility of the liquidating trustee to separately try to account for the source or payment of those funds.

Q. So that neither the source nor the particular claims that were paid were identified?

A. That is correct. They were—within the court orders of settling the claims, there may have been one defined debtor that was responsible for that payment, but the accounting records that were set up did not segregate and track them by debtor entity.

[75] Q. You are testifying that this was because there was a transfer of ownership of the cash? I think that is what you said, isn't it?

MR. STETTIN: Objection, Your Honor. That is not a proper characterization of his testimony.

THE COURT: Answer the question, please.

Can you answer the question?

THE WITNESS: Yes. The reason I did it is because we were instructed by trustee's counsel not to segregate the funds and he felt that it may be imprudent to spend the liquidating trust money to pay for professional fees to segregate those funds.

MR. MUSSELMAN: Thank you.

THE COURT: Does the Government have any questions?

MR. DeLEON: No. No questions, Your Honor.

MR. STETTIN: No redirect.

THE COURT: Thank you, sir.

(Witness Excused.)

THE COURT: Next witness, please.

MR. STETTIN: Mr. Benson.

[76] THEREUPON:

CLIFFORD BENSON

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STETTIN:

Q. Sir, would you please tell us your name and your professional address?

A. My name is Clifford Benson. My professional address is Touche Ross, 100 Chopin Plaza here in Miami.

Q. What is your occupation?

A. I am a CPA.

Q. What firm do you practice with?

A. Touche Ross.

Q. Are you a partner in the firm?

A. I am.

Q. How long have you been certified in Florida?

A. About six years, since early 1982.

Q. Are you certified in any other jurisdictions, sir?

A. New York.

Q. How long have you been a C.P.A.?

[77] A. I am trying to remember when I passed the exam. I think it was about 1980, right before I came down here.

Q. Do you have a specialty within the practice of accountancy?

A. Tax.

Q. What is your position in the Touche Ross office in Miami?

A. I am head of the department.

Q. The Tax Department?

A. Yes.

Q. Did Touche Ross represent any of the debtors in the consolidated proceedings that we are involved in now? That is, Holywell Corporation, et al?

A. We were accountants for some of the members of that group prior to the bankruptcy.

Q. In the bankruptcy did you continue that representation of any of the members of the group?

A. We did some work after the bankruptcy based upon a court order.

Q. After confirmation, did Touche Ross continue to represent any of the debtors in these proceedings?

A. No. We continued to do work based upon what we believed was a court order asking us to do so.

[78] Q. Let me show you this document which has been marked in evidence as Plaintiff 2. It's a letter dated June 5, 1986, which appears to have been written by you.

A. Yes. Other than the fact that I apparently didn't sign it.

Q. Not this copy, anyway.

Do you recall the letter?

A. I just looked at it recently, so I can say, yes, I can recall it.

Q. Could you read out loud the first paragraph on the first page?

A. "Based upon the above facts, we believe that no new taxable entity has been created by the bankruptcy proceedings for M.C.L.P. or Holywell.

"We further believe that the interest earned on the invested funds should be allocated to the taxable entity that contributed these funds. We will insure that this income is included in the tax returns for the entities we prepare."

Q. Let me show you next this letter of April 29, 1987, which you did sign.

I would ask you if you can identify it.

[79] MR. STETTIN: Any objection?

MR. DeLEON: No.

THE COURT: Ted, you have seen this?

MR. GOULD: No objection.

MR. STETTIN: We will offer this into evidence as the Plaintiff's next numbered, Plaintiff's Number 5.

(WHEREUPON, the document referred to was marked as PLAINTIFF'S EXHIBIT NUMBER 5 and received into evidence.)

BY MR. STETTIN:

Q. I ask you, sir, do you recall this letter?

A. I do.

Q. Does that letter say, basically, the interest allocations are going to be included in the Holywell and the M.C.L.P. tax returns which are going to be filed by the Touche Ross firm?

A. Well, let me see.

Q. That letter is dated April 29, 1987.

A. Well, yes. If we had prepared those returns, the intention was that if there was interest that was supposed to be allocated down there, we would have done that.

Q. Is it your testimony now that given the opportunity to prepare these returns, Touche Ross [80] intends to in-

clude in each one of these debtor's tax returns its allocable share of the interest income earned while the monies were in the hands of the liquidating trust?

A. That's what number five says, yes.

Q. Turn the page and read out loud the second page.

A. "As we said in our June 5, 1986 letter to Mr. Gould, we do not believe that the Miami Center Liquidating Trust as created by the bankruptcy proceeding is a taxable entity."

Q. Why did you say that?

A. We said that because we didn't think it was a taxable entity.

Q. What made you believe it?

A. Well, there are a number of things. Unfortunately, I didn't look at the whole research file before I got here, but I believe there is a Code Section 1399 that stands for the principal that when you form a trust in bankruptcy, that it is just for purpose of liquidation, was just to move money around, not to replace the entities which were still for tax purposes in place.

Q. Did you understand in this proceeding, this liquidating trust was not to take over to the exclusion [81] of the debtors' right forever all of the assets of the debtors?

A. (No response.)

Q. I will restate it, if you would like.

Q. Were the debtors to have any continuing interest in their assets?

A. That would, I guess, require me to go back and read the order and everything else. I don't remember that from the order.

Q. Were the debtors discharged in this case?

MR. DeLEON: I object.

MR. STETTIN: If he doesn't know, he doesn't know.

BY MR. STETTIN:

Q. Is your view that the liquidating trust was not a taxable entity based upon the fact that its purposes were limited by the plan of reorganization?

A. That was our view.

Q. That its purpose was only to identify and pay creditors and turn over the remaining assets to the debtors?

A. Well, I can't define what they were to do but our view was that the taxable entities which were there before the bankruptcy proceedings remained in the bankruptcy proceedings, that for tax purposes, [82] corporations, partnerships, whatever they were, did not lose their tax identity and the trust was simply there to administer whatever went on in the proceedings.

The order was a little difficult to understand from time to time.

MR. STETTIN: Nothing further on direct, Judge.

THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. GOULD:

Q. Is Touche Ross Holywell's tax accountants?

A. No.

Q. Did it ever prepare a tax return for Holywell Corporation?

A. Not to my knowledge.

Q. As I understand your testimony, the funds that remain that were the assets of Holywell Corporation and Miami Center Limited Partnership, Chopin Associates, non-filed companies, all passed through in effect the chapter proceedings and were taxable to the separate entities; is that correct?

A. I don't know if I said that. What I said was that our understanding of the way to file the returns was that the entities remained as the entities.

[83] Q. As separate taxable entities?

A. Yes.

Q. Right?

A. Right.

Q. Now, would you read into the transcript the Internal Revenue Code. Is that the—what is it, 6012(B)3?

A. Right.

MR. STETTIN: Your Honor, it's not in evidence yet but if Mr. Gould will tell me that it's simply a copy of Section 6012(B)3.

MR. GOULD: I tell you that.

MR. STETTIN: I have a copy of the Code section.

MR. GOULD: Why don't we use the Code Section. You can introduce it into evidence.

THE WITNESS: Would you like me to read this, sir?

BY MR. GOULD:

Q. Yes.

A. All good accountants check to make sure that is really the cite they are reading. Okay.

"Receivers, trustees and assignees for corporations."

This is 6012(B)3.

[84] "In a case where a receiver, trustee in a case under Title 11, United States Code or assignee by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all of the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations required to make such returns."

Q. To your knowledge, does the trustee possess substantially all of the property of Holywell Corporation and its non-filed subsidiaries?

A. That's—I don't know how to answer that, Ted, to be honest with you. I mean—

Q. You did the financial audit for Holywell as of December 31st, 1983?

A. I am assuming we did. I am not the audit partner. To be honest with you, I am not sure what we did.

MR. GOULD: All right. Thank you very much.

THE COURT: How about the pamphlet? Are [85] you going to introduce that?

MR. GOULD: Why don't you put that into evidence?

MR. STETTIN: Your Honor, I will put it in as our exhibit. It's simply a copy of the Internal Revenue Code.

THE COURT: All right.

MR. STETTIN: That would be Plaintiff's Number 6.

(WHEREUPON, the document referrered to was marked as PLAINTIFF'S EXHIBIT NUMBER 6 and received into evidence.)

THE COURT: Any other questions, gentlemen?

MR. DeLEON: No questions.

THE COURT: All right. Thank you, sir.

MR. STETTIN: Thank you.

(Witness Excused.)

THE COURT: Next witness, please.

MR. STETTIN: Fred Stanton Smith.

THEREUPON:

FRED STANTON SMITH

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STETTIN:

Q. Tell us your name and business address, please?

A. Fred Stanton Smith, Keyes Company, 100 North Biscayne Boulevard.

Q. Are you the trustee of the Miami Center Liquidating Trust?

A. I am.

Q. When were you appointed to take over?

A. In the early fall of 1985.

Q. When did you actually take over?

A. October 10, 1985.

Q. Is that the day when the plan became effective?

A. Yes, it is.

Q. Was that the day when the sale of the Miami Center property occurred?

A. Yes, it is.

Q. Other than executing the instruments of [87] transfer, the closing documents on October 10 or October 11, 1985, I know it went into the early morning hours, do you have any other control of any other property other than money of any of the consolidated debtors?

A. No, I do not.

Q. During the time that you have been the liquidating trustee, have you operated any of the business or business entities—

A. No, I have not.

Q. —of any of the consolidated debtors?

A. No.

Q. Have you done anything except hold title to the money and determined the validity, priority and amount of the claims against the consolidated debtors?

A. That's all I have done.

MR. STETTIN: Nothing further on direct.

THE COURT: Gentlemen?

CROSS EXAMINATION

BY MR. GOULD:

Q. I want to clear something up.

On August 12, 1985, were you appointed as the trustee or the liquidating trustee of the debtors estate, Miami Center Liquidating Trust?

MR. STETTIN: I will stipulate, Judge, [88] whatever the order says, and I know there is an order for appointment.

MR. GOULD: There is a reason for that. The term liquidating trust is a term of art. That is, liquidating trustee is.

THE WITNESS: I can't really answer the question.

THE COURT: Do you have the order?

MR. STETTIN: No, but I will get you one.

MR. GOULD: August 12, 1985.

MR. STETTIN: It's a two or three or four page order.

THE COURT: Can you tell the Court and stipulate what the order said, trustee or liquidating trustee?

MR. STETTIN: I can't remember.

MR. GOULD: Trustee.

THE COURT: All right.

MR. STETTIN: Give us a second and we'll find it.

THE COURT: Surely.

MR. ZIEGLER: I have a copy the order. It's part of a large volume that is bound.

THE COURT: Just show it to me and I will take judicial notice of it for the record.

[89] Mr. Gould, do you care to point it out?

MR. GOULD: Right up on top.

THE COURT: Appointed as trustee for the purpose of the bank's plan.

Let's see, the trustee and his representative shall very—how about under duties and responsibilities. Anything in that?

The Court would take judicial notice of the order appointing Mr. Smith trustee by Judge Britton as of August the 12th, 1985.

MR. STETTIN: We will make sure a separate copy is included, Judge. If you will reserve an exhibit number, we will put that in as Plaintiff's Exhibit Number 7.

THE COURT: Good enough.

(WHEREUPON, the document referred to was marked as PLAINTIFF'S EXHIBIT NUMBER 7 and received into evidence.)

BY MR. GOULD:

Q. Were you appointed as a trustee in bankruptcy under the Bankruptcy Code?

A. No, I was not.

Q. Upon your appointment as trustee of the Miami Center Liquidating Trust, did you review the Bank of New York's disclosure statement and amended [90] consolidated plan of reorganization?

A. The amended plan, not the disclosure statement.

Q. Are the powers and authority of the trustee specifically enumerated in Article V of the plan of reorganization?

A. They are in the plan. I don't know if it's Article V or not.

THE COURT: Off the record, while Mr. Gould and Mr. Stettin are discussing this.

(Off the Record.)

BY MR. GOULD:

Q. Does Article IV, Means For Execution Of A Plan, specifically enumerate the assets available for the payment

of claims and creditors and liabilities of the debtors' estates?

MR. STETTIN: I will stipulate, Judge, that will be Plaintiff's 8 and we will make sure a copy of that is filed as an exhibit in the case so you will have the opportunity to see it.

THE COURT: What was that document you are going to reserve?

MR. STETTIN: The amended consolidated plan of reorganization proposed by the Bank of New York.

THE COURT: Fine.

[91] (WHEREUPON, the document referred to was marked as PLAINTIFF'S EXHIBIT NUMBER 8 and received into evidence.)

BY MR. GOULD:

Q. Did you review and approve the adversary proceeding filed by your counsel in this particular case?

A. I think there are two questions there.

Q. No, no, no, no. You have already answered Article IV. Let's go into the next one.

MR. STETTIN: He is talking about this adversary today.

BY MR. GOULD:

Q. This adversary, did you review it?

A. Yes.

Q. In the adversary proceeding, your counsel has alleged that the Bank of New York did not disclose that there was no provision made for the payment of the debtors' Federal and state income tax liability; is that correct?

A. That's correct.

Q. As the trustee, do you consider the Bank of New York's conduct to be a material act of omission?

A. Yes.

Q. Has it damaged the trust in the conduct of its [92] responsibility to pay claims?

A. I can't judge that.

MR. CARTER: Your Honor, I think he is asking the witness for a legal conclusion.

BY MR. GOULD:

Q. Does the Bank of New York –

MR. CARTER: Your Honor?

MR. GOULD: No, that's all right.

THE COURT: Overruled.

Mr. Gould, I will take care of the proceedings.

MR. GOULD: Sorry.

THE COURT: Proceed.

BY MR. GOULD:

Q. Does the Bank of New York's confirmed plan state that it is a fiduciary acting on behalf of the debtors?

You will find that in Article V, Paragraph 3, sub paragraph W. I will finish the question.

That you did not have a fiduciary duty to determine the debtors' tax liability? Does anything in the Bank of New York's plan state that you do not have the fiduciary duty to determine the amount of the debtors' tax liability?

A. It's a double negative.

[93] Q. No, it's not a double negative.

THE COURT: All right, gentlemen.

THE COURT: Do you know?

THE WITNESS: I don't understand the question with the double negative in it.

THE COURT: Rephrase the question.

BY MR. GOULD:

Q. Does the Bank of New York plan provide that you do not have a fiduciary duty to determine the amount of the debtors' tax liability, federal and state tax liability?

A. No.

Q Does anything in the Bank of New York's plan state that you do not have the responsibility to prepare the debtors' tax returns?

A. No.

Q. Does anything in the bank's plan state that you do not have the responsibility to establish reserves for the payment of the debtors' federal and state income tax liabilities?

A. No.

Q. Has the trust received interest income since October 10, 1985?

A. Yes.

Q. On behalf [94] of the debtors? Was it on behalf of the debtors?

A. It was interest income for the liquidating trust.

Q. Do you have any idea how much it was?

A. I would venture approximately $2 million.

MR. STETTIN: Monthly statements are generated, Judge, and copies are provided to the debtors. If he has a copy, I will agree to it.

BY MR. GOULD:

Q. Is that post-confirmation income?

A. Yes.

Q. Have any dividends been made to the debtors, the discharged debtors' estate?

A. No.

Q. Has the trust determined – well, I think that's it. Thank you very much.

THE COURT: Any other questions from that table? How about the Government?

MR. DeLEON: Yes.
THE COURT: Fine. Proceed.

CROSS EXAMINATION

BY MR. DeLEON:

Q. Have you paid any post-confirmation [95] expenses incurred by the estate, by the liquidating trust?
A. Expenses?
Q. Yes.
A. Yes.
Q. Do you have any indication as to how much you have paid?
MR. STETTIN: Again, Your Honor, those are generated on a monthly basis.
THE WITNESS: It's in the reports.
MR. STETTIN: And we will make a copy available to the Government.
MR. DeLEON: I have never received copies, Your Honor.
Are they in the bankruptcy files?
MR. STETTIN: These are generated by Arthur Anderson and made available to the debtors as well as counsel for the liquidating trust.
THE COURT: Counsel for the Government, do not talk among yourselves.
MR DeLEON: I am sorry, Your Honor.
MR. STETTIN: Sorry, sir.
MR. DeLEON: What I would like to do is if the trustee would make those available to me, I would like to introduce them into evidence.
[96] THE COURT: We have got too many moths flying around out there without any string attached to them.
Do you know the answer to the question he asked?
THE WITNESS: Not off the top of my head. It's in every monthly report.

THE COURT: They are available in the Trustee In Possession Reports or whatever classification he is known as, Liquidating Trustee's Report.

BY MR. DeLEON:

Q. But you do have paid post-confirmation expenses from the assets of the liquidating trust?
A. Yes.
MR. DeLEON: No further questions.

REDIRECT EXAMINATION

BY MR. STETTIN:

Q. Let me show you this document dated October 10, 1985, on the stationery of the Bank of New York, and ask you if you received this as part of the closing documentation at the sale of the Miami Center property?
A. Yes, I did.
Q. Is that the indemnification agreement that [97] we have referred to in the adversary complaint?
A. Yes, it is.
MR. STETTIN: I offer it into evidence as the trustee's next numbered exhibit.
MR. ZIEGLER: No objection.
MR. STETTIN: Without objection, Judge.
THE COURT: Any objection from this side of the room?
MR. MUSSELMAN: No objection.
MR. GOULD: No.
MR. STETTIN: I didn't think so.
THE COURT: All right.
(WHEREUPON, the document referred to was marked as PLAINTIFF'S EXHIBIT NUMBER 9 and received into evidence.)

BY MR. STETTIN:

Q. Did you rely on this indemnification –

A. Yes, I did.

Q. – in going through with the sale, sir?

A. Yes.

MR. STETTIN: Thank you, sir. I have nothing further on redirect.

THE COURT: Any other questions?

Next witness, please.

(Witness Excused.)

[98] MR. STETTIN: The trustee has no further witnesses, Judge.

THE COURT: All right. How about – I will just go from this side over here.

Does the bank have any witnesses?

MR. CARTER: No, Your Honor.

THE COURT: All right. Mr. Gould, do you have any witnesses?

MR. GOULD: No.

THE COURT: Counsel?

MR. MUSSELMAN: No, Your Honor.

THE COURT: How about the Government?

MR. DeLEON: Your Honor, we don't have any witnesses. I just want to make one clarification. I wanted to introduce into evidence as Government's case the proposed plan of reorganization, but that was already introduced as Exhibit 8.

THE COURT: And that's going to be submitted with a tag on it later on.

MR. STETTIN: Your Honor, if it will save time, if he has another copy –

THE COURT: Do you have one that is not marked up?

MR. DeLEON: It's not marked. I can take the paper clips off.

[99] THE COURT: What are you doing now?

MR. STETTIN: I removed the tag 8 from that one and put it on this one. It's still Plaintiff's Exhibit 8.

THE COURT: It's not marked up? Even if it is, I can fetter it out.

MR. STETTIN: It's clear.

MR. DeLEON: We don't have any more.

THE COURT: Okay. We now have an Exhibit Number 8.

Do you have any other evidence, counsel, or witnesses?

MR. DeLEON: No witnesses.

THE COURT: Any paper evidence or anything?

MR. DeLEON: No, sir.

THE COURT: All right. All sides rest?

All sides rest.

MR. GOULD: Is there closing argument?

MR. STETTIN: He is just asking if you have evidence.

MR. GOULD: We rest.

THE COURT: Now, then, the Court notes that there has been no response in the negative to the question, have all parties rested. With no response, the Court concludes –

[100] MR. STETTIN: We rest, Judge.

THE COURT: Everybody rests?

MR. DeLEON: Yes.

MR. MUSSELMAN: We rest.

THE COURT: A nod of the head.

Mr. Gould, what is your response?

MR. GOULD: Yes, we rest.

THE COURT: All right. Good enough.

The bank had previously indicated they rested. All right.

So there will be no misunderstanding, the Court determines that all sides have rested, all the evidence is in, and now let's have about, with the number of parties in-

volved, and the clock indicating the little hand at four and the big hand at 12, let's now have about ten minutes of your best shots and we will conclude this matter.

MR. STETTIN: Yes, sir.

THE COURT: Incidently, in order to perhaps temper your closing arguments, I am going to ask that each party give me a memorandum of law within ten days so that might have some effect on your closing arguments.

The Bank of New York has already submitted theirs.

[101] MR. ZIEGLER: May we submit another one based upon what has happened at the hearing, to the extent that it may be necessary to supplement?

THE COURT: All right.

MR. ZIEGLER: One was pretrial.

THE COURT: I do not want a responsive memo. It will be simultaneous.

If you feel that you have to supplement your already submitted one, fine.

MR. ZIEGLER: Thank you.

THE COURT: Mr. Stettin?

MR. STETTIN: Yes, sir.

Your Honor, as I understand the case at this point, it's simpler than originally anticipated.

THE COURT: That is what the Government said.

MR. STETTIN: In that the Government does not dispute the fact that there is no obligation on the part of the liquidating trust to file returns.

Have I correctly stated that?

MR. DeLEON: Excuse me?

MR. STETTIN: I think I understood the Federal Government to say there is no obligation on the part of the liquidating trust to file returns.

MR. DeLEON: Our position is that the trust [102] is not a separate taxable entity aside from the corporate debtors.

MR. STETTIN: Does it have an obligation to file a tax return?

MR. DeLEON: It has an obligation to file a tax return on behalf of the debtor.

MR. STETTIN: I am glad I didn't take their offer before, Judge.

As I understand the Government's position, if there is any obligation to file a tax return, it arises under the provisions of Title 26, United States Code, Section 6012(B)3 and (B)4.

The evidence is absolutely unrebutted. There isn't a single piece of evidence that says otherwise than that this liquidating trust was set up pursuant to the terms of a plan, which provided that the 541(a) defined assets of the debtors would be included as the trust estate, including but not limited to, and that I believe is a direct quote, the Washington proceeds and the proceeds from the sale of the Miami Center when it was sold.

From that point forward, the trustee has indicated that the only time he did anything in this case, other than hold money and pay out on claims that were approved, was when he executed the documents of [103] conveyance at the closing, on October 10, 1985. He never operated the debtors' business.

I don't think it can logically be said under any set of circumstances that he was an operating trustee under any facts at all in this case. He did not operate the business of the debtor. The debtor continued in existence. It has its own financial officers, it has its own offices. It certainly has a vigorous proponent of its position, Mr. Gould.

It also has the right to receive every single dollar that is left after the purpose of the trust have been fulfilled, which is the identification, the amount and the payment of creditors.

THE COURT: Which is really our goal, isn't it?

MR. STETTIN: Yes, sir. Yes, sir. Sometimes in the distance but, yes. That tunnel doesn't look any shorter at this point.

Section 6012(B)3 specifically says it is limited in its application to receivers, trustees in a case under Title 11 or assignees. We are none of those. We are not a receiver, we are not a Title 11 trustee in bankruptcy.

The order appointing the trustee specifically says it is an order appointing a trustee [104] under the terms of the bank's plan. It says it in the order. The plan doesn't create a Chapter 11 trustee, it creates a contract trustee, something every one of the parties in this case have consistently said.

He does not have all of the power and authority of a bankruptcy trustee or that he did for other purposes because in fact it would make the trustee's life much easier. The arguments that the debtor has that there is no continuing jurisdiction of this Court are directly related to the fact he is not a bankruptcy trustee, he is a contract trustee and his contract time ran out, they said.

Now, if that is true, they can't have it on both sides.

The third and last of the areas which the statute refers to is if he is an assignee. Well, he is not an assignee, he is a court appointed person, he is a person who is named in a plan.

There is a case, as a matter of fact, which directly addresses that issue. It's called, just for the record, In Re Sonner, S-o-n-n-e-r, at 53 B.R. 859.

They are talking about a liquidating trust in a bankruptcy proceeding. They are talking about a claim that liquidating trust had the obligation to file the tax returns [105] for the debtors and to pay the tax for the debtors. The Bankruptcy Judge held otherwise.

There was also a claim made that this might even be a trust within the meaning of Section 6012. They were discussing the obligations of the trust in this case.

The provisions of the plan, I am reading from Page 864:

> "The provisions the plan control and both Sonner"—that's the debtor—"and the creditors' trust have the duty and responsibility of carrying out the plan."

Citing Section 1142(a) of the Bankruptcy Code.

The trust was created for no other reason but to pay Sonner's debts and under the terms of the plan, the mandate is clear that they must be paid. That's the only purpose of this liquidating trust in Sonner. That's our only purpose. We give back everything we have left over.

We don't end up with anything. We get paid only as a result of the service in identifying, fixing the amounts and paying claims. The debtor gets everything else.

That's exactly what we have here.

THE COURT: Who determines how much money [106] is to be placed into the trust that the liquidating trustee is handling?

MR. STETTIN: It was determined under the plan as follows. All of the 541(a) assets were put in, including but not limited to the cash available, which was the Washington proceeds and the cash that would be available when the Miami Center was sold. That was the start up money.

If you needed more, the trust included all of the 541(a) assets. If you don't need anymore, then you didn't go to it. If you had money left over, whether you went to the other assets or not, you gave it back to the debtor, and that's exactly what we propose to do.

THE COURT: What if you need more money at any given time? Where do you get it if these funds have been exhausted?

MR. STETTIN: If the debtors' 541(a) assets are exhausted and there remain unpaid claims of any kind, the trust simply is unable to pay them.

THE COURT: You have no reservoir?

MR. STETTIN: No, there is not, and those claims have to be paid in the order of strict priority as well. That is crit-

ical in this case. That is the reason why we are concerned and filed this proceeding [107] because we don't know that we have enough.

We will know, we will have enough, in my opinion, if we don't have tax liability.

I believe that that doesn't answer the question. Obviously, we still need to determine as a matter of law whether we have the obligation to file a return, to determine the tax and to pay the tax.

THE COURT: What is your position on the fact that a tax is or is not owed?

MR. STETTIN: There is no tax owed by the liquidating trust. There is or may be a tax owed by the debtor. That's not our fight. The debtors continue in existence. The post-confirmation debtors remain viable entities. The Internal Revenue Service has all kinds of remedies available to them. It is not our dispute.

I am also—I don't wish to give the impression that we are not relying on this. If there is a determination made by the Court under any circumstances that we owe tax monies, the Bank of New York in fact is required to indemnify us on two theories.

One, the indemnification which is in evidence that they gave us saying if any liability arises from your conveying this Miami Center property to us, we will make it good to you.

THE COURT: And?

[108] MR. STETTIN: The second one is that they caused this problem. They put out a disclosure statement and a plan and didn't provide for this obligation and everyone relied on it.

The most horrible result that I can imagine is some $500 creditor who got paid two years ago is going to have someone knocking on his door saying give it back because your

priority of payment rights are below those of the Internal Revenue Service. Give it up.

I don't want to be the person to go to them. I think the Bank of New York should make it good.

THE COURT: Let's send Francis Carter. What do you think?

MR. STETTIN: The only other claim made by the Internal Revenue Service, they have a right to require this estate to file a return and pay the tax is the next subsection in 6012, and that is returns of estates and trusts. Returns of an estate, a trust or an estate of an individual, Mr. Gould in this case, under Chapter 7 or 11 of Title 11 of the United States Code, shall be made by the fiduciary thereof.

We are a fiduciary under the plan in the sense that we owe a duty to Mr. Gould to make sure we [109] perform our functions correctly. We do because he is the residuary beneficiary. Every beneficiary of a trust has the right to say his trustee is his fiduciary. That does not mean that we are a fiduciary in the sense that we are a continuing, ongoing business entity who has a separate existence requiring them to pay taxes.

We are nothing but an interim machine designed to provide the neutral means of determining who the creditors are and getting them paid. We were created by a contract. We cease to exist when our function is fulfilled.

To say that we have a tax paying function, it seems to me, is to transmute us into a brand new entity. We were not created that way. We were not anticipated to carry on business activities. We don't sell wine or beer. We don't sell widgets, we simply have the money that we have and identify who the creditors are and then pay them and then go out of existence.

To say that we have to pay tax means that the debtors in fact then avoid that responsibility. There is no other

theory espoused by the I.R.S. other than that we are a trust required to pay taxes. We are not that kind of trust.

The only other incident I have ever been [110] able to locate, and I wanted to refer the Court to it, is a definition which the Internal Revenue Code has as to a liquidating trustee. A liquidating trust, rather.

The citation is in the definition section under 7711, it is from the Volume 9 of the C.C.H. Standard Federal Tax Reports, and it defines liquidating trusts.

Let me read it, please.

"Certain organizations which are commonly known as liquidating trusts are treated as trusts for purposes of the Internal Revenue Code.

"An organization will be considered a liquidating trust if it is organized for the primary purpose of liquidating and distributing the assets transferred to it and if its activities are all reasonably necessary to and consistent with the accomplishment of that purpose.

"A liquidating trust is treated as a trust for purposes of the Internal Revenue Code because it is formed with the objective of liquidating particular assets and not as an organization having as its purpose the carrying on of a profit-making business which normally would be [111] classified as corporations or partnerships.

"However, if the liquidation is unreasonably prolonged or if the liquidation purpose becomes so obscure by business activities, that the declared purpose of liquidation can be said to be lost or abandoned, the status of the organization will no longer be that of a liquidating trust.

"Bondholders protective committees, voting trusts and other agencies formed to protect the interests of security holders during insolvency, bankruptcy or corporate reorganization proceedings are analogous to liquidating trusts but if subsequently utilized to further the control or profitable operation of a going business on a permanent, continuing basis, they will lose their classification as trust for purposes of the Internal Revenue Code."

THE COURT: Let's wrap this up. You are getting near the end.

MR. STETTIN: I am.

We don't owe it because we are not within the definition of any one of the tax reporting and tax paying entities set up by the Internal Revenue Code.

THE COURT: Thank You.

[112] Mr. Carter? Who will represent the bank?

MR. CARTER: I will, Your Honor.

THE COURT: All right. Bearing in mind that you are going to supplement this with a memo.

MR. CARTER: Yes, Your Honor.

THE COURT: Proceed.

MR. CARTER: Your Honor, as to why the liquidating trustee is not liable, I don't want to repeat any of the arguments that Mr. Stettin has made to ably.

I would say to the Court that there is a case that will no doubt be cited by the folks at this table called the I.J. Knight Realty case, and I simply ask the Court to bear in mind, in terms of the distinction Mr. Stettin has made, in that case you had an actual bankruptcy trustee. What we would call, it was an Act case, but what we would call under the Code a Chapter 7 trustee, clearly falling within the purview of the Section 6012 of the Internal Revenue Code.

I think what we are saying here under the Sonner case, we have an entirely different animal with a much more limited purpose that falls outside the purview of the Internal Revenue Code, it's not a taxable entity.

Also, we rely on the Alanwood Steel (phonetic) case, which dealt with the disbursing agent [113] and similarly found the disbursing agent was not liable for the tax.

Again, it's cited and discussed in our memo.

I think what the Court needs to do here is to look at the function that Mr. Smith played, the role he played in this case, what did he do.

Well, he transferred the real estate, which was probably never even actually transferred to him, but he transferred it in the twinkling of an eye and he received some cash and distributed it to creditors.

As far as the tax falling on the debtors, really, that is where it should fall. Remember, the debtors are the ones who have taken the tax benefits from these projects all these years, they are the ones with the operating losses. They are the ones who were waxing fat off the benefits as investors, they are the ones who had the accumulated losses to offset this tax liability, if there is one, and it would not be fair to have the creditors bear the brunt of the tax while they hoard these losses for other projects.

Let me just for a moment, and we will supplement it in our memo, address the arguments. I think what Mr. Stettin has said is the debtors are liable, the trustee is not liable, but if the trustee is [114] liable, then the bank is liable.

THE COURT: I was just going to say, don't get too cozy with the trustee because he may turn on you.

MR. CARTER: Yes, Your Honor, if it comes to that.

First of all, the indemnity is in evidence. We don't believe it's that broad, we don't believe it reaches the issue of tax liability. It doesn't say that it does, nor would it be fair to so construe it.

If we look at what role the bank played, the bank paid full value for this project. Perhaps some might say the bank over paid for this project.

In any event, the bank, Your Honor, satisfied its lien in full, which was some $242 million. It paid another $13 million in cash.

In addition, it gave up its claim on cash collateral so that other creditors might be paid for that collateral, and if there is any residue left of the funds in the hands of the liquidating trustee, those will go to the debtor and not back to the bank, so the bank took for full value here.

There is no question of transferee liability here to the bank, no question that the bank has achieved any windfall or paid less than its fair [115] share.

You know, it's fine to say, well, the plan was defective. Well, that plan has been approved by any number of courts, including this Court, and the appellate courts.

Those decisions are the law of the case, and there is simply no legal basis. I hear an argument that, well, the bank should be liable if the trustee is liable, but we don't hear any citation to any authority because there is none, Your Honor. There is simply no basis there.

Thank you, Your Honor.

THE COURT: Thank you. Very well said and short.

Mr. Gould?

MR. GOULD: We are going to rely on the statutes. The Internal Revenue Code defines a fiduciary as follows, quote:

> "A guardian, trustee, executor, administrator, receiver, conservator or any other person acting in a fiduciary capacity for any person."

7701 Treasury Regulations states that a fiduciary is a person who occupies a person of peculiar confidence towards others, states as follows.

> "Holds in trust an estate to which another has a beneficial title or in which another has a beneficial interest or receives and controls income of another as in the case of a receiver."

Mr. Stettin continually says the trustee is not a receiver. Well, I think a receiver in the old Act was defined as follows: One, to take charge of the property of a bankrupt. Two, to conduct the business of the bankrupt. Three, to afford representation of the estate in an action, adversary proceeding or contested matter when no trustee is qualified or the interest of the trustee may be adverse to that of the estate.

If you read Article V of the bank's plan, you will find that that is exactly what Mr. Smith is. He is a fiduciary and in fact he is a receiver, too, although 11 U.S.C. Section 105(b) specifically precludes the appointment of a receiver.

Mr. Carter was correct. We rely upon I.J. Knight, which says, quote, the pertinent sections of the Internal Revenue Code renders the non-operating trustee, non-operating trustee, of the Code, of a bankrupt corporation liable for the payment of taxes on the bankrupt's income, provided the trustee has possession of or title to substantially all of the bankrupt's property.

[117] Now, this goes on and says since the taxpayer concedes he did satisfy the proviso, he is liable for the payment of taxes and taxable income.

When I was a poor student studying at Oxford University at the feet of some eminent philosophers, I was taught that a logical paradox is something which one makes a statement, a conclusion of which does not follow.

My friend, Mr. Stettin here, has said the trustee holds in his possession, so has the bank, all of the Section 541(a) assets for the bankrupt debtors' estate.

As a matter of fact, it holds more than that. It also holds the assets of the non-filed companies. There are no other assets.

Section 541, according to the bank –

THE COURT: Should he have the assets of these non-filed companies?

MR. GOULD: No, he shouldn't.

THE COURT: All right. Go ahead.

MR. GOULD: But they hold them, they are in their possession, they have received the interest income from them, okay, and they are specifically enumerated in Article V – excuse me, Article V refers to the Section 541 assets. That is it. There is nothing more, unless [118] you once say they have some access to my intellect.

Anything else is intangible. There is no other source of funds for the payment of the income taxes, and we have in fact made a demand upon them to pay the July 31st, 1965 federal and state income taxes, and they have not done that.

MR. MUSSELMAN: 1985.

MR. GOULD: 1985, I am sorry.

Every case that I have seen, I.J. Knight, Sapphire Steamship Lines, simply cites the Code. The bankruptcy tax reform act of 1980 made the Bankruptcy Reform Act of 1978 consistent with the Internal Revenue Code. They can't hold all the 541(a) assets and not pay the taxes.

Now, they want to say that the trustee is simply a disbursing agent, and it improperly has control of 18-and-a-half million dollars of the assets of the non-filed companies, and returns those funds to the non-filed companies, and, yes the non-filed companies are jointly and severally liable for the payment of the income taxes and they will file the returns and pay the taxes, but the trustee is in possession of those assets, too.

Without those assets, the taxes cannot be paid.

[119] I submit that those taxes are payable, Holywell admits they are payable, and this situation is going to get worse because of their claim that they hold all the 541(a) assets although they have not been specifically enumer-

ated. 541(a) assets, for example, the plan does not specifically enumerate my interest in the joint venture as being an assets of the trust.

If you conclude that the trustee hold all the 541(a) assets, including the assets of the non-filed companies and my interest in the Miami Center Joint Venture, you will be confronted with a tax liability in excess of $20 million.

Thank You.

THE COURT: Counsel?

MR. MUSSELMAN: I think the points have been made and I will try to be very brief.

THE COURT: Yes, sir.

MR. MUSSELMAN: It's a small part of the total but I think we need to keep track somewhere along the way to the fact that regardless of how you interpret the plan or the Court orders or anything else, the trustee has also gotten his hands on monies that the [120] orders specifically said he shouldn't, namely, because he took all the proceeds from the Washington property and not the net proceeds which is what the order said he was to get.

Mr. Stettin likes to increase the Alice in Wonderland aspect of this case by saying that though he represents the trustee and the trustee has a trust, and the trust was created as part of a Chapter 11 plan, that proves he is not a trustee under Chapter 11.

I think Alice in Wonderland is the only place where that will fly.

MR. STETTIN: I will just respond briefly to one point –

THE COURT: Let all of them finish.

MR. STETTIN: I'm sorry, I thought they did. I thought he was the last one.

MR. DeLEON: Well, Your Honor –

MR. STETTIN: Oh, I apologize.

THE COURT: This is impetuous youth speaking.

(Laughter)

MR. STETTIN: Thank you for the compliment, Judge.

THE COURT: Mr. Mark would want to say something, Mr. Orr, if he were here.

[121] Would you care to speak in his behalf?

MR. ORR: Judge, I am not exactly clear on what my authority is with regard to speaking for Mr. Mark, but I think it is important, from what I know, I am a newcomer to the situation, but it's important from what I heard that there are several distinctions that need to be made.

One is the order did provide for the net proceeds. Unfortunately, the trustee took the gross proceeds. There is some distinction there.

Secondly, with regard to the Sonner case, that case concerned the transfer of real estate and all the trustee was doing there was acting as a conduit for the transfer of real estate. Here we are concerning substantially money and all the assets for the corporations, including the assets and liabilities, including tax liabilities.

Other than that extent, Your Honor, I think it best that I remain mercifully short and sit down.

THE COURT: Fine. Thank you, sir. This would probably be what Mr. Mark would have said.

All right, Government.

MR. ORR: Thank you.

MR. DeLEON: Your Honor, I will be the briefest of everyone.

[122] THE COURT: Take your time. Don't feel obligated to go under the allocated ten minutes because I am going to be here and the Court Reporter is going to be here, so take your time.

MR. DeLEON: I will file a memorandum in ten days.

THE COURT: That is the extent of your argument, all right.

MR. STETTIN: It's a hard act to follow, Judge.

THE COURT: It is.

MR. STETTIN: I have two comments.

One, Mr. Orr made a very interesting comment. He said Sonner, the case I cited as being factually the closest—

MR. ORR: Objection. Excuse me, Your Honor. I don't usually do it on closing argument.

I don't think I said it was close, I was drawing a distinction.

MR. STETTIN: No, I am saying it is.

MR. ORR: He said I said it was factually close, I was drawing a distinction.

MR. STETTIN: He said it's distinguishable because it—

MR. ORR: Excuse me, Mr. Stettin. I said [123] there is a distinction of that case and the case we are here on.

MR. STETTIN: Sure, he's right. The distinction he said existed there was that case involved the sale of real estate. That is what this case involves, the sale of real estate.

There are no other assets that the trustees has ever had his hands on except the proceeds from the sale of real estate in this case. That is why I say it is factually the closest that I can find.

If Mr. Orr thinks that there is some mistake in that, then let him say it again, Judge, because there ain't no difference between them.

There is one other comment that Mr. Musselman made that I think deserves response and that is he keeps saying I have invented some fact because the monies that we got from the sale of the Washington properties were only supposed to be net, net of tax is what he says. They all say that.

I am going to read you from the order of October 22nd, 1984, which is the order approving the authorizing Holywell Corporation and Theodore B. Gould to consummate

the sale of certain real and personal property and directing segregation of net proceeds due Holywell Corporation and Theodore B. Gould.

[124] That is their order, that is their motion. Judge Britton said:

> "Holywell and Gould be and they hereby are directed to segregate the share of the net proceeds due Holywell and Gould from the sale of the real and personal property approved by this order and to invest such proceeds in accordance with Section 345 of the Bankruptcy Code, and hold same subject to further order of this Court."

The net proceeds that they are talking about there clearly, by definition, were all of the net proceeds they got from the sale. They say, oh, no, that meant we had to pay taxes on it before it became net. They took the net proceeds from their order, from their sale and they put it in the bank. That is the money that the trustee ended up with. The trustee didn't put it there. They did.

THE COURT: If I understand your argument, then, from the gross, they should have kept the money to pay the taxes.

MR. STETTIN: Or said something about that.

THE COURT: Mr. Gould?

MR. GOULD: Thank you.

THE COURT: Do you speak as to [125] Mr. Musselman's response to Mr. Stettin?

MR. GOULD: And Mr. Orr, too.

THE COURT: Mr. Musselman, do you relinguish this opportunity to respond to Mr. Stettin's Alice in Wonderland with the ships and the sealing wax and all those other parodies?

MR. GOULD: First, Sonner.

THE COURT: I guess the answer is yes.

MR. MUSSELMAN: Yes.

MR. GOULD: The answer is yes.

Sonner is a grantor trust with other assets that were specifically put in the reorganized debtor, the grantor trust. We had never granted this trust any existence at all.

Secondly, the debtors, from the very beginning of this proceeding, have said that there was a tax liability related to the sale of those assets and also related to the sale of the Miami Center Limited Partnership assets.

If you recall, I read you Judge Britton's quote prior to confirmation of the plan. I also read to you the finding of fact that he adopted verbatim proposed by the Bank of New York and the January 29th, 1986 order on remand.

There is no question that there were tax [126] liabilities related to this transaction. Everybody knew it. The Bank of New York did not disclose it. That was a material ommision of fact. There are no funds available for the payment of those taxes.

My final point is another quote:

> "Failure to perform this duty, to file the taxes and pay the taxes, if it is required, could result in personal liability for the trustee."

It's the Third Circuit in I.J. Knight, and that's the situation that exists today.

Thank you.

THE COURT: I thank all of you for an interesting, respectful, short hearing, and if you will now submit your memos of law within ten days, simultaneously.

MR. DeLEON: Your Honor, does ten days include the weekends?

THE COURT: Well, let's just give you a date before we get too technical on what that includes.

We have today, the 11th, the next week would be the 18th, so let's say by the 24th. That will be the 24th at 5 o'clock. There will be no responses. Just get it in. Don't respond to anybody else.

You have the opportunity to supplement yours, sir, because no one else has had an opportunity [127] to respond to it, so you might as well supplement it, depending upon what you found out from today's hearing.

MR. ZIEGLER: We will not repeat anything we have already said.

THE COURT: You send Mr. Carter, prepare him to knock on the doors of these people who have already gotten their money.

MR. ZIEGLER: Better him than me, Your Honor.

MR. CARTER: Thank you, Judge Weaver.

THE COURT: Okay. Thank you all.

For the record, let me respond to Mr. Orr's statement. Mr. Orr was here as a spectator, I asked him if he cared to respond for Mr. Mark. He was really not prepared to make a statement today and I am certainly not going to hold you to your statement.

MR. MARK: I appreciate your recognition, Judge.

THE COURT: Thank you.

(Whereupon, the hearing was concluded.)

[128] **CERTIFICATE**

STATE OF FLORIDA)
: SS
COUNTY OF DADE)

I, Jaclyn M. Ouellette, Shorthand Reporter and Notary Public in and for the State of Florida at Large, do hereby certify that I was authorized to and did report in shorthand the proceedings at the foregoing hearing, and that the pages, numbered from 1 through 127, inclusive, contain a full, true and complete transcription of my shorthand report of same.

WITNESS my hand and seal this 13th day of February, 1988.

/s/ Jaclyn M. Ouellette
Jaclyn M. Ouellette
My Commission Expires:
February 14, 1990.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
CHAPTER 11 Proceedings

Case Nos. 84-01590-BKC-TCB,
84-01591-BKC-TCB,
84-01592-BKC-TCB,
84-01593-BKC-TCB,
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, ET AL., DEBTORS

DEBTORS' OBJECTIONS TO LIQUIDATING TRUSTEE'S SECOND REPORT

Holywell Corporation ("Holywell"), Miami Center Limited Partnership ("MCLP"), Miami Center Corporation ("MCC"), Chopin Associates ("Chopin"), and Theodore B. Gould ("Gould"), Debtors (hereinafter referred to collectively as "Debtors"), respond to the Liquidating Trustee's Second Report in Conjunction with Consummation of the Confirmed, Amended, Consolidated Plan of Reorganization and Amendments thereto, filed by the Bank of New York (the "Plan"), by objecting to certain of the Liquidating Trustee's acts as reflected by the Second Report and requesting this Court to order the Liquidating Trustee to take immediate action to correct or remedy these inappropriate actions. In support thereof, Debtors show that:

1. Many of the Liquidating Trustee's actions, as set forth in the Second Report, to which the Debtors object

are contrary to the Plan, prior Orders of this Court, and the Bankruptcy Code.

2. The Liquidating Trustee has filed the Second Report without being responsive to input by the Debtors and in particular, the Liquidating Trustee has refused to allow the Debtors' Chief Financial Officer to communicate directly with Arthur Andersen & Co., the Liquidating Trustee's independent accountant, even though this Court directed such communication to take place in the Order on Debtors' Motion for Accounting dated April 9, 1986.

3. The Liquidating Trustee has not pursued the resolution of the closing adjustments between the Buyer and Seller (Liquidating Trustee on behalf of Chopin and MCLP). These adjustments have been delayed over seven months since the closing of the sale of the Miami Center to the Bank of New York (the "Bank") on October 11, 1985. It is imperative that the necessary adjustments be made immediately in that the Miami Center Liquidating Trust (the "Trust") is entitled to credit adjustments totaling approximately $3,000,000.00. These include the following: a) a discount for Seller's pro-rata share of the 1985 real estate taxes due to the Liquidating Trustee not paying those taxes during November, 1985 but improperly waiting until March 31, 1986 to make such payment; b) a credit for the excess of the Seller's pro-rata share of the actual 1984 and 1985 personal property taxes compared with the escrowed amounts; c) a credit for the direct cost of inventories and stored construction materials, after the credit of $550,000 given at the closing for the latter is taken into account; d) a credit for the monies Debtors in possession spent to complete construction under the super

priority loans granted by the Court, in that the Bank's purchase price already included a deduction for the estimated costs for completion of construction; e) a credit for the one-half of the title insurance premium charged to Seller in that title insurance already existed on the Bank's mortgage on the subject property and this mortgage has never been satisfied; and f) a credit for accounts receivable for the Pavillon Hotel as of October 10, 1985 which Intercontinental Hotel, as agent for the Bank, has been collecting. In addition, the undefined abatements for 44 unfurnished hotel rooms and missing chattels listed on the closing statement are not warranted and are contrary to the Plan in that the Plan provides for the purchase of the subject property for $255,600,000.00 on an "as-is" basis.

4. The Debtors admit that the Liquidating Trustee holds the stock of Holywell Telecommunications Company and Holywell Leasing Company, wholly-owned subsidiaries of Holywell; however, the Liquidating Trustee acted improperly by either giving the property of Holywell Telecommunications Company and Holywell Leasing Company to the Bank for no consideration or in not collecting rent from the Bank pursuant to valid leases.

5. The Liquidating Trustee has failed to follow the terms of the Plan in that he has paid interest on allowed claims at the same time that the principal amounts of the claims were paid even though the Plan provides that interest shall be paid ninety days after the payment of principal. In addition, the Plan makes payment of interest contingent on the Trust having sufficient assets in the liquidating fund, and the Second Report indicates that the Liquidating Trustee believes a deficit exists in the liquidating fund instead of a surplus.

Further, the Liquidating Trustee has interpreted the Plan improperly and has paid interest as of August 22, 1984, the petition filing date, instead of the effective date

of the Plan. The Liquidating Trustee attempts to justify his payment of interest at the same time as the payment of principal by referring to the Bank's authorization for payment of interest, when the Bank had its claims satisfied first and had no legal right to authorize such payment.

6. The Plan provides for payment of all of Holywell's creditors prior to distribution from its assets in payment of the allowed claims against the other Debtors. The Liquidating Trustee, Street Associates and Eleven Dupont Circle Associates, even though the majority of allowed claims against all other Debtors have been paid.

7. The Liquidating Trustee prematurely sold treasury bills held in the name of Twin Development Corporation, resulting in a loss to the Trust from such sale. This issue is presently on appeal.

8. The Liquidating Trustee has improperly added $3,000,000.00 to the reserves in Class 6 for the Bank's legal and loan expenses, even though the Bank has filed no application for its legal and loan expenses and would not be entitled to such an amount. Although the Trustee professes ignorance as to the need to provide for any reserve for the Bank's legal and loan expenses when he set aside reserves for disputed claims, prior Orders of this Court and even the application for fees of Counsel for the Liquidating Trustee, when he was counsel to the MCLP and MCC Creditors' Committees, had indicated that the Bank would be claiming substantial amount for such expenses.

9. The Liquidating Trustee incorrectly defines Class 1 as "operating expenses unpaid and unreported by the Debtors in Possession but paid by the Liquidating Trustee". Class 1 is defined by the Plan as "Administrative Claims as the same are allowed and ordered paid by the Court".

Approximately $2,294,498.00 of the total of $2,932,800.20 paid to Class 1 creditors were for adminis-

trative fees, the Liquidating Trustee's bond, and payment of Holywell's payroll and operating expenses, all of which were approved by this Court. Contrary to the Liquidating Trustee's statements on pages 4 and 11 of the Second Report, the Debtors provided the Liquidating Trustee with a complete listing of outstanding payables and checks disbursed as of October 10, 1985 in payment of payables. Debtors had to turn over their records to the Liquidating Trustee, so that other amounts coming due after that time were not known to the Debtors. Bank service charges were incurred due to the Liquidating Trustee's removal of and freezing funds in the Debtors' operating bank accounts on October 11, 1985, causing checks disbursed in payment of operating expenses to be returned for "insufficient funds".

10. Certain payments made by the Liquidating Trustee of claims in Class 1, Class 4, and Class 6 are incorrect and contrary to Orders of this Court. Even though the Debtors already have pointed out most of these incorrect payments to the Liquidating Trustee, the Second Report does not reflect that any of these improper payments have been returned to the Trust.

11. The Liquidating Trustee has established reserves that are excessively high and unwarranted for Class 4, Class 5 and Class 6, for real property taxes for 1982 through 1984 and for potential federal income taxes on interest income earned by the Trust, as listed in composite Exhibit "A" to the Second Report. The reserves for these classes should be substantially reduced in that many claims for which reserves exist have been settled or dismissed or the amounts reserved are higher than the present claims.

12. The Liquidating Trustee has underestimated the reserve for Class 1 administrative expenses in providing for only $500,000, as to Debtors' knowledge, applications for legal fees and expenses incurred in the continued administration of the Debtors' estates will exceed $1,000,000.

13. The Liquidating Trustee has withheld for no valid reason payment of a few allowed claims in Class 4 and of numerous allowed claims in Class 6, as shown by examination of Exhibit "E" and Composite Exhibit "K" to the Second Report, which list reserve amounts for these classes.

WHEREFORE, Debtors request this Court to not approve the Liquidating Trustee's Second Report, to order the Liquidating Trustee to correct the improper and incorrect actions he has taken to date which are reflected in his Second Report, and to reaffirm this Court's Order of April 9, 1986 which directed Debtor's Chief Financial Officer to communicate directly with the Liquidating Trustee's accountants.

KENT, WATTS & DURDEN

By: /s/ Betsy C. Cox

FRED H. KENT, JR.
BETSY C. COX
850 Edward Ball Building
Post Office Box 4700
Jacksonville, Florida 32201
(904) 354-1600
Attorneys for Debtors

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 21st day of May, 1986, to the parties listed below.

/s/ Betsy C. Cox
Attorney

Barry Davidson, Esq.
Steel, Hector & Davis
4000 Southeast Financial
Center
Miami, Florida 33131-2398
Attorneys for Bank of
New York

S. Harvey Ziegler, Esq.
Kirkpatrick and Lockhart
1428 Brickell Avenue
Miami, Florida 33131
Attorneys for Bank of
New York

Irving M. Wolff, Esq.
Holland & Knight
1200 Brickell Avenue
Miami, Florida 33131
Attorneys for Liquidating
Trustee

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New York, New York
10036
Attorneys for Olympia &
York

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et al.
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Miami, Florida 33137
Attorneys for Unsecured
Creditors' Committee
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Attorneys for Bank of
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John W. Kozyak, Esq.
Kozyak & Tropin, P.A.
607 New World Tower
100 N. Biscayne Blvd.
Miami, Florida 33132
Attorneys for Olympia &
York

TOUCHE ROSS & CO.
CERTIFIED PUBLIC ACCOUNTANTS

June 5, 1986

Mr. Theodore B. Gould
President
Holywell Corp.
Post Office Box 6279
Charlottesville, VA 22906

Dear Mr. Gould:

This letter is in response to a request by Ed Schumacher regarding the preparation of the tax return for Miami Center Limited Partneship (MCLP) and Holywell Corporation and Subsidiaries (Holywell).

It is our understanding as a result of substantial consolidation the cash collateral of $28,986,112, held pursuant to a court order of December 13, 1984 was contributed to the confirmed plan. These funds were transferred to the liquidating trustee on October 10, 1985. Prior to the liquidating trustee being empowered, the funds had been invested in U.S. Treasury Securities and substantial amounts of interest were earned. Ed has asked us to look into the taxability of the interest income earned on the funds held by the liquidating trustee. It is also our understanding that all items relating to your individual tax matters will be handled by the accounting firm of Hester, Roth & Callaway.

Based on the above facts, we believe that no new taxable entity has been created by the bankruptcy proceedings for MCLP or Holywell. We further believe that the interest earned on the invested funds should be allocated to the taxable entity that contributed these funds. We will ensure

that this income is included in the tax returns for the entities we prepare.

At this time there is some confusion regarding the scope of our employment under the Bankruptcy Court's Order. We have been advised by our attorney not to proceed with any further processing of tax returns until the position of the liquidating trustee has been clarified regarding this matter. Although we believe that tax work clearly is within our scope as outlined by the Court, until this matter is clarified, we cannot proceed further. As you know, we have already invested time examining some of the issues relating to the return.

* * *

If you should have any questions or comments please do not hesitate to contact us.

Very truly yours

By: /s/ Clifford G. Benson, Jr.

CLIFFORD G. BENSON, JR.

CB/twp

HOLYWELL CORPORATION

March 11, 1987

VIA FEDERAL EXPRESS

Irving M. Wolff, Esq.
Holland & Knight
1200 Brickell Avenue, 14th Floor
Miami, Florida 33131

Re: Miami Center Liquidating Trust
As a Taxable Entity

Dear Irving:

Since the Miami Center Liquidating Trust is not a taxable entity, the interest earned on the funds deposited by the Liquidating Trustee in Certificates of Deposit, Treasury Bills, and Repurchase Agreements has been reported as taxable income in 1985 in accordance with Edgar Schumacher's attached memorandum. The taxable interest income has been segregated to the accounts of Twin Development Corporation, Holywell Corporation, the Miami Center Limited Partnership, and myself. The interest income for 1986 will also be reported separately by each of the above taxable entities.

Sincerely yours,

/s/ Theodore B. Gould

THEODORE B. GOULD

fm
Attachments
cc: Edgar Schumacher, Jr.

M E M O R A N D U M

DATE: March 10, 1987

TO: Theodore B. Gould

FROM: Edgar Schumacher, Jr.

RE: ALLOCATION OF INTEREST EARNED ON TRUSTEE'S BANK ACCOUNTS 1985

For the filing of the debtors' respective tax returns for 1985, it was necessary to determine the correct amount of interest earned on their funds. This had to include the period of 10/10/85 through 12/31/85 while their funds were in the Trustee's accounts. I did the analysis to determine the amounts earned by each debtor.

For my analysis, I used Arthur Andersen's summary of receipts for the period 10/10/85 - 4/30/86. I then analyzed the individual bank statements for each account for these months and also considered the interbank transfers among these accounts.

The attached schedule with supporting schedules indicates the amounts of interest earned by the respective taxpayers for 1985 and the first four months of 1986. For 1986 tax returns, I will do a similar analysis for all of 1986.

For 1985, you earned $16,908.40 in interest from the Trustee accounts and included this amount in your 1985 tax return form #1040.

For 1985, MCLP earned $124,480.33 in interest from the Trustee accounts and this was included in the 1985 MCLP partnership tax return form #1040.

As you know, we are working on the accounting transactions for the tax reporting fiscal year of 7/31/86 for both Holywell Corporation and Twin Development Corporation. Each corporation will be reporting its respective amounts on its form #1120 corporate tax returns.

fm
Attachment

HOLYWELL CORPORATION

March 19, 1987

Mr. Fred Stanton Smith, Liquidating Trustee
Miami Center Liquidating Trust
c/o The Keyes Company
100 North Biscayne Boulevard, 20th Floor
Miami, Florida 33132

Re: Interest Withheld in 1985

Dear Fred:

During the 1985 period of your trusteeship, Sun Bank withheld $8,414.98 of interest earned on the cash investments and deposited it with the IRS. The third report dated 8/30/86 indicated that steps had been taken to have this amount refunded. To date, I have seen nothing to indicate that this in fact has been done.

Since the Miami Center liquidating Trust is not a taxable entity, all interest earned is allocable to the appropriate debtors and no interest should have been withheld by the Bank. The appropriate forms should be filed to get a refund of the $8,414.98.

If, in fact, the Trust had a responsibility to file a fiduciary return (which we believe it does not), those returns are due on a calendar year basis. You therefore would have had to file at the end of 1985 and at the end of 1986. You did not and have not been advised to do so. However, the Debtors, as the appropriate taxable entities, have filed tax returns including the 1985 interest income earned. It follows, then, that your advisors' internal opinion is that the Trust is not a separate taxable entity.

I do not understand how seventeen months have elapsed and this tax matter is still considered an open question and not resolved.

For your information, enclosed is recent correspondence to Irving regarding this item.

We all want to get this Trusteeship closed. This issue is one of the impediments that must be resolved to achieve closing.

Sincerely yours,

/s/ Edgar Schumacher, Jr.
EDGAR SCHUMACHER JR.
Chief Financial Officer

fm

cc: Irving Wolff
Rudy Pittaluga

April 29, 1987

Mr. Fred Stanton Smith, Liquidating Trustee
Miami Center Liquidating Trust
c/o Keyes Company
100 North Biscayne Blvd., 20th Floor
Miami, Florida 33132

RE: Miami Center Liquidating Trust

Dear Mr. Smith:

We presently have outstanding two invoices totaling \$70,000 to the Miami Center Limited Partnership (MCLP) (copies enclosed). The services that were performed during the summer and fall of 1986 related to various research on the tax effects of the bankrupt proceedings on MCLP along with the preparation of the 1985 MCLP tax return.

We believe that as part of the administration of the bankruptcy estate you should make every effort to ensure that the required federal and state filings are completed. This would include the appropriate inclusion of interest income being earned by the respective entities on those returns.

We have been requested by Mr. Gould to again begin the process of preparing the 1986 MCLP tax return along with representing MCLP in an ongoing Internal Revenue Service audit. In addition, we have been requested to begin preparing the Holywell corporation's returns for 1985 and 1986. The 1985 Holywell return is already late. We believe that it is in the bankruptcy estate's best interest to get all of these tax returns filed and resolve the IRS audit as quickly as possible while the issues are fresh in everyone's minds. This will save countless man hours later.

We are, however, hesitant to continue providing services when we have had invoices outstanding for such a long period of time. We understand that our invoices have been approved by Mr. Gould, however, they have not yet been presented to the court for payment. We do not know why these invoices have not yet been presented to the court and respectfully request that you submit them for payment so that we can continue to provide the requested services.

We appreciate your consideration in this matter and if you should have any questions, please do not hesitate to contact me.

Very truly yours,

CLIFFORD G. BENSON, JR.

CB.wp

cc: Theodore B. Gould
Irving M. Wolff, Esq.

THE BANK OF NEW YORK

October 10, 1985

Holland & Knight
1200 Brickell Avenue
Miami, Florida 33131

Attention: Irving Wolff, Esquire

Re: The Contract of Sale to be executed by The Miami Center Liquidating Trustee pursuant to which The Miami Center project and other property shall be conveyed to The Bank of New York or its nominee (the "Contract")

Gentlemen:

We are delivering this letter to you at your request and pursuant to your concern that the proper grantor in the Contract and Trustee's Deed should not be the Liquidating Trustee, as provided in the Contract attached to The Bank of New York's confirmed Plan of Reorganization (the "Plan") but should instead, based on your interpretation of applicable bankruptcy laws, be The Miami Center Liquidating Trust.

Under the Plan ". . . all right, title and interest of the Debtor in and to the Trust Property, including Miami Center, shall vest in the Trustee . . . " on the Effective Date (page 20 of the Plan), and " . . . the Trustee shall have full power and authority to: . . . (c) reduce all of the Trust Property to *his* possession and hold the same . . . " (page 21 of the Plan, emphasis added). In addition, please note the express non-recourse language on page 25 of the Plan.

You have indicated that you are unwilling to permit the Contract to provide that the grantor be Fred Stanton Smith as Liquidating Trustee under The Miami Center Liquidating Trust unless The Bank of New York provide an indemnity to said Liquidating Trustee.

Pursuant to your request, the Bank of New York hereby indemnifies and agrees to hold harmless Fred Stanton Smith as Liquidating Trustee under The Miami Center Liquidating Trust for any claims against said Liquidating Trustee, as a result of the execution of the Contract in the manner set forth in the above quoted provisions or any other provision of the Plan.

Very truly yours,
THE BANK OF NEW YORK

By: [signature illegible]
Vice-President

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

Civil Action No. 87-0037-C

TWIN DEVELOPMENT CORPORATION, PLAINTIFF

v.

FRED STANTON SMITH, THE BANK OF NEW YORK AND
IRVING WOLFF, DEFENDANTS

ANSWERS OF DEFENDANT WOLFF TO PLAINTIFF'S INTERROGATORIES

COMES NOW the Defendant IRVING M. WOLFF and answers the Interrogatories previously propounded by the Plaintiff as follows:

* * * * *

Answer to Interrogatory 2b.

The Bank and its representatives insisted that Fred Stanton Smith, as Liquidating Trustee, execute the documents effectuating the transfer of the assets from the Miami Center Liquidating Trust to The Bank of New York. To save the Liquidating Trustee harmless as a result of the execution of the contract by him as Liquidating Trustee, we obtained the letter of indemnity so that if any claims were made upon the Liquidating Trustee for payment of unpaid taxes, i.e., Internal Revenue Service claims, which would result from the sale and transfer of the property at the closing, the question and payment of the allowed superpriority claims, the accountability to the unfiled subsidiaries, and the question of the charging of post-bankruptcy interest, the Liquidating Trustee would be completely indemnified and saved harmless from such exposure.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
CHAPTER 11 Proceedings

Case Nos. 84-01590-BKC-TCB,
84-01591-BKC-TCB,
84-01592-BKC-TCB,
84-01593-BKC-TCB,
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, ET AL., DEBTORS

ORDER EXTENDING DATE FOR FILING PROOFS OF CLAIMS

This cause was heard on December 20, 1984 on the ore tenus application of Finley, Kumble for an order granting it an extension of time within which to file a proof of claim against the Debtors herein, with counsel for Finley, Kumble announcing that such extension was needed because Finley, Kumble may have some pre-petition claims against one or more of the Debtors based on the termination of its lease; it being further suggested that because there might be other creditors in similar situations, the bar date of December 20, 1984 for filing proofs of claims should be extended for all entities which hold claims; the Debtors having consented to an extension of the bar date to January 15, 1985, and there being no objection from any of the Creditors' Committees or secured creditors present; and the Court being fully advised, and sufficient cause appearing therefor, it is

ORDERED and ADJUDGED that effective December 20, 1984, the time period for all entities which hold a claim against one or more of the Debtors herein to file proofs of claims pursuant to Rule 3003(c) of the Bankruptcy Rules hereby is extended from December 20, 1984 to January 15, 1985, the bar date.

DONE and ORDERED at Miami, Florida, this 27 day of December, 1984.

Thomas C. Britton
THOMAS C. BRITTON
U.S. Bankruptcy Judge

Copies to:

Fred H. Kent, Jr., Esq.
All Members of the Creditors' Committees
All Attorneys of Record

Service of this Order to be Performed
by Fred H. Kent, Jr., Esq.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
CHAPTER 11 Proceedings

Case Nos. 84-01590-BKC-TCB,
84-01591-BKC-TCB,
84-01592-BKC-TCB,
84-01593-BKC-TCB,
85-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, MIAMI CNTR LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, THEODORE GOULD

ORDER SETTING HEARING TO CONSIDER APPROVAL OF DISCLOSURE STATEMENT, SETTING LAST DAY TO FILE APPLICATIONS FOR COMPENSATION, SETTING LAST DAY TO FILE CLAIMS, SETTING HEARING ON CONIRMATION AND SETTING LAST DAY TO ACCEPT OR REJECT PLAN

A disclosure statement has been filed by the debtor as required by 11 U.S.C. § 1125. A hearing will be held on March 25, 1985 at 9:30 o'clock a.m. at Room 1406, 51 Southwest First Avenue, the Federal Building, Miami, Florida to consider the disclosure statement and any objections or modifications to it. The disclosure statement is on file with the clerk of this court. Copies may be obtained from the debtor.

Objections to the disclosure statement shall be filed with the court and served on the debtor, any creditors' committee and, if there is one, on the trustee, Fred Kent, attorney for the debtor, **SHALL MAIL AT LEAST 25 DAYS**

BEFORE THE DISCLOSURE HEARING A COPY OF THIS ORDER, to every creditor, equity security holder and every other party in interest. A copy of the plan and the disclosure statement shall be mailed with this order, only to the debtor, the trustee, any creditors' committee, all professionals whose appointment has been approved by the Court, the Securities and Exchange Commission, the Internal Revenue Service and any party in interest who requests in writing a copy of the disclosures statement or plan.

Notice is given to all prospective applicants for compensation, including attorneys, accountants and other professionals that the deadline to file application for fees in this case is March 25, 1985. Fee applications timely filed, shall be considered at the confirmation hearing.

The debtor has filed a list of creditors and equity security holders pursuant to Rule 1007(b). Creditors holding listed claims which have been scheduled accurately and which are not listed as disputed, contingent or unliquidated as to amount need not file a proof of claim. All other creditors must file a proof of claim on or before January 15, 1985*. n/a of ______________ has been appointed trustee of the above-named debtor.

The hearing on confirmation of the plan will be held on April 29, 1985 at 9:30 o'clock a.m. at Courtroom 1406, 51 Southwest First Avenue, the Federal Building, Miami, Florida. Objections to the confirmation of the plan shall be filed with the court ten days prior to the hearing on confirmation, and a copy of such objection must be served on the debtor, the trustee, and any creditors' committee appointed by the court.

April 29, 1985 is fixed as the last day for filing acceptances or rejections of the plan.

NOTICE IS GIVEN that at any hearing scheduled by this order, this court will consider dismissal of this case or its conversion to a chapter 7 liquidation under § 1112(b) upon the request of any interested party made at or before the hearing.

Upon the approval of the disclosure statement, Fred H. Kent attorney for the debtor, **SHALL MAIL FORTHWITH A COPY OF THIS ORDER** to every creditor, equity security holder and every other party in interest and **SHALL MAIL AT LEAST 25 DAYS BEFORE THE CONFIRMATION HEARING COPIES OF THE PLAN, THE DISCLOSURE STATEMENT, THE BALLOT FORM** and a **LIST OF ALL APPLICANTS FOR COMPENSATION ALONG WITH THE AMOUNT CONTAINED IN THE APPLICATION** to these same persons. The attorney shall file a certificate of these mailings.

DONE and ORDERED at Miami, Florida, this 15th day of February, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

xc: Debtor
Fred H. Kent, attorney for the debtors

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
CHAPTER 11 PROCEEDINGS

Case No. 84-01590-BKC-TCB

IN RE: HOLYWELL CORPORATION, ET AL., DEBTOR(S)

ORDER REQUIRING FILING OF FINAL FEE APPLICATIONS AND SETTING HEARING ON FEE APPLICATIONS

Over 200 days have elapsed since all applicants were directed to file final fee applications in this chapter 11 case. A confirmation order was entered on August 8, and it is necessary that the applicants supplement the fee applications due to the length of time which has elapsed since March 20 when fee applications were directed to be filed and April 29 when this court held a confirmation hearing where fee applications were also to be considered. Post confirmation matters were conducted before this court on motions of the interested parties.

Therefore, all applicants are required to file final fee applications not later than October 17. Applicants can comply by referring to and incorporating by reference previous applications for fees in this matter with identification of caption and date of filing.

A hearing to consider all applications for compensation and reimbursement of expenses shall be held on October 21, 1985, at 9:30 a.m. in courtroom 1406 at 51 Southwest First Avenue, Miami, Florida.

DONE and ORDERED at Miami, Florida, this 27th day of September, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

Copies to:

Fred H. Kent, Jr.
All Members of the Creditors' Committee
All Attorneys of Record
All Affected Parties

Service of this order to be performed by Fred H. Kent, Jr., Esquire

Supreme Court of the United States

No. 90-1361

HOLYWELL CORPORATION, ET AL., PETITIONERS

v.

FRED STANTON SMITH, ETC., ET AL.

ORDER ALLOWING CERTIORARI. Filed May 28, 1991.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is granted. This case is consolidated with 90-1484, *United States* v. *Fred Stanton Smith, et al.* and a total of one hour ;s allotted for oral argument.

May 28, 1991

Supreme Court of the United States

No. 90-1484

UNITED STATES, PETITIONER

v.

FRED STANTON SMITH, ET AL.

ORDER ALLOWING CERTIORARI. Filed May 28, 1991.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is granted. This case is consolidated with 90-1361, *Holywell Corporation, et al.* v. *Fred Stanton Smith, etc., et al.* and a total of one hour is allotted for oral argument.

May 28, 1991

U.S. GOVERNMENT PRINTING OFFICE 1991—282-061/40016

(7)

Nos. 90-1361, 90-1484

In The

Supreme Court of the United States

October Term, 1991

Holywell Corporation, *et al.*,
Petitioners

v.

Fred Stanton Smith, *et al.*

United States of America,
Petitioner

v.

Fred Stanton Smith, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR PETITIONERS HOLYWELL CORPORATION, ET AL.

Dennis G. Lyons
Counsel of Record
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Washington, D.C. 20036
(202) 872-6700

Stuart E. Seigel
Kent A. Yalowitz
65 East 55th Street
New York, New York 10022
(212) 750-5050

Attorneys for Petitioners Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Theodore B. Gould

Of Counsel:
Arnold & Porter
Washington, D.C., and
New York, New York

July 1991

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

QUESTION PRESENTED

Is a trustee appointed by a bankruptcy court as part of a confirmed plan of reorganization to effect a liquidation of a debtor's estate required to file federal income tax returns and to pay federal income taxes?

PARTIES TO THE PROCEEDINGS BELOW AND STATEMENT PURSUANT TO RULE 29.1

1. Petitioners in No. 1361 are Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Theodore B. Gould. Holywell Corporation and Miami Center Corporation state that they have no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.1. Petitioners Miami Center Limited Partnership, Chopin Associates and Theodore B. Gould are not corporations.

2. The United States of America is the petitioner in No. 1484.

3. Respondents are Fred Stanton Smith, The Bank of New York and Shutts & Bowen.

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TABLE OF AUTHORITIES—Continued

**BRIEF FOR PETITIONERS
HOLYWELL CORPORATION, ET AL.**

OPINIONS OF OTHER COURTS

The majority and dissenting opinions of the court of appeals (Pet. App. 1a-16a) are reported at 911 F.2d 1539 (11th Cir. 1990). The court of appeals' denial of rehearing and rehearing in banc (Pet. App. 40a-41a) is unreported. The opinion of the district court (Pet. App. 17a-27a) is unreported. The opinion of the bankruptcy court (Pet. App. 28a-37a) is reported at 85 Bankr. 898 (Bankr. S.D. Fla. 1988).

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1990 (Pet. App. 1a), and a suggestion of rehearing in banc (which is treated by the Eleventh Circuit as a petition for rehearing as well, 11th Cir. R. 35-6) was denied on December 21, 1990 (Pet. App. 40a-41a). Petitions for certiorari were filed by Holywell Corporation, *et al.*, on February 28, 1991, and by the United States on March 20, 1991. On May 28, 1991, the Court granted the petitions and consolidated the cases. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (1988).

STATEMENT

1. *The Bankruptcy Cases.*—In August 1984 the five related petitioners in No. 1361, Holywell Corporation ("Holywell"), Miami Center Limited Partnership ("MCLP"), Miami Center Corporation ("MCC"), Chopin Associates and Theodore B. Gould (collectively, the "debtors"), each filed petitions for reorganization under Chapter 11 of the Bankruptcy Code. Petitioner MCLP developed the Miami Center, a hotel, office and retail complex in Miami, Florida. Chopin Associates owned the land upon which the Miami Center was built. MCC and Gould were general partners in MCLP. Holywell was a limited partner. Holywell's and Gould's principal assets prior to the filing of the bankruptcy petitions consisted

of (1) their equity in the Miami Center; and (2) equity in properties located in the Washington, D.C., area.[1]

Respondent The Bank of New York ("BNY" or the "Bank") was the lead mortgage lender to MCLP. The debtors filed their petitions after the Bank had commenced foreclosure proceedings in Florida state court.

2. *The Bank's Plan.*—In February 1985, each of the debtors and the Bank proposed plans of reorganization. The debtors' plans contemplated the sale of the Miami Center—and, as a consequence, the payment of some $22.2 million in federal income taxes on the debtors' capital gains from the sale, as is required of any bankruptcy reorganization plan by 11 U.S.C. § 1129(d).[2]

The Bank's Plan also contemplated the sale of the Miami Center; the Bank's Plan and Disclosure Statement, however, were silent on the subject of federal income taxes. The Bank has now admitted to this Court

[1] These "Washington properties" were sold during the first few months of the bankruptcy proceedings in 1984. By February 1985, Holywell had approximately $15.1 million in cash available to pay its liabilities of about $3.3 million, not including federal and state income taxes or its guarantees of the several construction mortgages given by MCLP to The Bank of New York. Pro Forma Balance Sheet and Liquidation Analysis Exs. C & E to Disclosure Statement and Plan of Reorganization of Holywell Corp. (Bankr. C.P., No. 377). In addition, Holywell's wholly-owned subsidiaries—which did not file bankruptcy petitions—had at least an additional $13.6 million in cash (before taxes) available for distribution as dividends to Holywell. *Id.* Because of Holywell's guarantees on MCLP's mortgages (which had been called), it was insolvent.

[2] Liquidation Analyses, Exs. E to Disclosure Statements and Plans of Reorganization of Debtors Holywell Corporation and Theodore B. Gould (filed February 15, 1985) (Bankr. C.P. Nos. 377, 381). Because Holywell had cash available to it (either of its own or of its non-debtor subsidiaries in excess of their liabilities) in a substantial amount, it could have paid its capital gains taxes, which would have been a first-priority administrative expense. The taxable gain realized by MCLP, a partnership, on disposition of the Miami Center, was taxable to its partners, including Gould and Holywell. I.R.C. §§ 701, *et seq.*

that its (undisclosed) intent was that the federal capital gains taxes would not be paid under its Plan. *See* BNY Br. in Opp. 9-10, 16, 27. Thus, unburdened by the millions of dollars of federal income tax liability that should have been paid, the Bank was able to treat itself in an extraordinarily generous fashion in its "cram-down" plan.[3] The Bank's Plan allowed the Bank to recover 100 cents on the dollar for all principal and all interest, including postpetition interest, even though the Bank was, according to the bankruptcy court that confirmed the Plan, "undersecured" and facing "a substantial loss." 54 Bankr. at 41, 43.[4]

The Bank's device for reaching this anomalous result was (1) substantive consolidation of the debtors' estates (*see* p. 4 n.5, *infra*) and (2) a heretofore unheard of loophole in the tax and bankruptcy laws: the appointment, as part of the Bank's chapter 11 plan of reorganization, of a trustee who would take possession of all the debtors' assets and sell them—without (we have now been told) paying federal or state taxes. Of course, the trustee's proposed immunity from paying taxes of any kind

[3] According to counsel for the Bank, a "cram-down" plan is one adopted over the objections of parties to the bankruptcy proceeding. F. Carter, "Orchestrating and Implementing a Successful Creditors' Plan," *The Bankruptcy Strategist* 3-4 (February 1987).

[4] This portion of the Bank's Plan therefore violated section 506 of the Bankruptcy Code, which provides that an undersecured creditor may not recover postpetition interest. *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 372-73 (1988). The trustee brought an adversary proceeding to obtain an adjudication resolving this anomaly, and the bankruptcy judge entered a one-page "judgment" (without any findings of fact or conclusions of law) reversing the decision that the Bank was undersecured. However, the district court vacated that judgment as "moot" under the bankruptcy "mootness doctrine," concluding that "the validity of the credit [for postpetition interest] under Section 506(b) as a matter of law must remain unanswered." The higher reviewing courts did not intervene. *In re Holywell Corp.*, No. 88-151-CIV (S.D. Fla. July 21, 1988), *appeal dismissed*, 923 F.2d 865 (11th Cir.), *cert. denied*, 111 S. Ct. 2259 (1991).

and from the operation of the priority statutes in favor of the United States was not disclosed by the Bank.[5]

On April 29, 1985, the bankruptcy court held a hearing at which it deferred consideration of the plans of reorganization. On July 18, 1985, the bankruptcy court held a hearing on the "substantive consolidation" portion of the Bank's Plan (*see* n.5, *supra*). Ruling from the bench, the bankruptcy judge approved the "modified form" of substantive consolidation. He stated: "I readily concede that I am a babe in the woods [in the tax area] and haven't the foggiest notion of what the tax conse-

[5] In addition to the use of a "liquidating trustee," the Bank's Plan employed several other interesting devices. First, it required the subordination of a $14 million priority claim by a joint venture between petitioner Gould and Olympia & York Florida Equity Corporation, a company unaffiliated with the debtors. As a result of this "subordination," the Order confirming the Bank's Plan was reversed because it "discriminate[d] unfairly" and was not "fair and equitable" in violation of 11 U.S.C. § 1129(b). *In re Holywell Corp.*, 913 F.2d 873, 879-81 (11th Cir. 1990). In addition, the Bank's Plan called for "substantive consolidation" of the debtors' estates. "Substantive consolidation has no express statutory basis but is a product of judicial gloss. [It] usually results in, *inter alia*, pooling the assets of, and claims against, the two entities; [and] satisfying liabilities from the resultant common fund . . . ." *In re Augie/Restivo Baking Co.*, 860 F.2d 515, 518 (2d Cir. 1988). Here, because substantive consolidation would have unfairly prejudiced the creditors of Holywell (which had substantial cash, *see* p. 2 n.1, *supra*), the Bank stipulated to—and the bankruptcy court approved—a "modified form" of substantive consolidation that called for the payment of Holywell's creditors out of Holywell's assets before Holywell's assets could be used to pay any claims against any of the other debtors. J.A. 55. Thus, under this modified form of substantive consolidation, the Government's tax claims against Holywell and its subsidiaries should have been paid before Holywell's funds could have been made available to creditors of the other debtors. *See also Sampsell* v. *Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941) ("all questions of fraudulent conveyance aside, creditors of the corporation normally would be entitled to satisfy their claims out of corporate assets prior to any participation by the creditors of the stockholder.").

quences would be on the particular decision that we are talking about right at the moment." [6]

The bankruptcy judge never satisfied himself that the Plan adequately provided for the payment of the taxes. Nonetheless (and without further hearing), on August 8, 1985, he confirmed the Bank's Plan. 54 Bankr. at 42-43. Pursuant to the Plan, the bankruptcy court appointed respondent Fred Stanton Smith as trustee. Smith accepted the appointment, declared that he satisfied the requirements for trustees under 11 U.S.C. §§ 321 and 101(13), and posted a one million dollar fidelity bond in favor of the United States. And on October 10, 1985, Smith sold the Miami Center to the Bank and its co-lenders.

Concerned about his potential personal liability because of, *inter alia*, the Bank's failure to provide for the payment of taxes, the trustee asked for and received from the Bank a personal indemnification. J.A. 169, 170-71.

The Plan provided the trustee with a full panoply of powers over the debtors' properties. He had the power to employ attorneys, accountants and, interestingly, despite the Bank's intentions, "tax specialists"; to prosecute, defend, settle or discontinue any disputes or litigation of the debtors; and to waive any of their rights. Pet. App. 45a. He had the power to sell, manage, operate, lease, mortgage, or otherwise "release, convey or assign any right, title or interest in or about the Trust Property." Pet. App. 44a. He had the right to "[d]eal with the Trust Property or any part or parts thereof in all other ways as would be lawful for any person owning the same to deal therewith, whether similar to or different from the ways above specified, at any time or times hereafter." Pet. App. 45a-46a. The only restriction on the trustee's power was that he could "[t]ake no action that would change the business of any of the Debtors . . . ." Pet. App. 46a.

[6] Transcript (July 18, 1985) (BNY Br. in Opp. B-49).

If that were not enough, the Plan went on to make the total control by the trustee crystal clear: "as to any party dealing with the Trustee in any manner whatsoever in relation to the Trust Property, the power of the Trustee to act or otherwise deal with said properties shall be absolute." J.A. 44.

Although the Bank's Plan did not expressly provide for the payment of federal income taxes, it did not openly purport to excuse the trustee from the obligation to file federal income tax returns or to pay federal taxes.[7]

The tax liabilities in question arise not only from the taxable gain realized when the trustee sold the Miami Center, but also from the trustee's post-confirmation earnings over the last five years, consisting of interest and other taxable receipts now totaling more than $18.4 million.[8]

3. *The Implementation of the Bank's Plan (Despite Its Nullification)*.—Two separate appeals of the confirmation order were taken. First, the debtors appealed. Second, the Miami Center Joint Venture ("MCJV"), a partnership between Gould and Olympia & York Florida Equity Corporation, also appealed. The two separate appeals were heard by different district judges and, on further appeals, by two separate panels of the court of appeals.

In the debtors' appeal, the district court affirmed the confirmation order. However, the court of appeals held that the debtors' failure to post a fifty million dollar bond precluded *any* appellate review of the confirmation order, under the Eleventh Circuit's expansive common law version of the bankruptcy "mootness doctrine." The court of appeals therefore *vacated* the district court order affirming the confirmation of the Plan. *Miami Center Limited Partnership* v. *Bank of New York*, 838 F.2d 1547, 1558 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988).

In MCJV's appeal, the district court *reversed* the confirmation order. *Olympia & York Fla. Equity Corp., et al.* v. *Bank of New York*, No. 85-3230 (S.D. Fla. March 24, 1987), *aff'd sub nom. In re Holywell Corp.*, 913 F.2d 873, 879-81 (11th Cir. 1990). The "mootness doctrine" was not held applicable to this appeal.[9]

4. *This Proceeding—The Bankruptcy Court and the District Court*.—Notwithstanding his statutory duties to do so, the trustee refused to file federal income tax returns or pay federal taxes. Instead, on December 28, 1987, he commenced an adversary proceeding in the bankruptcy court against the debtors and the United States, seeking a declaration that he was not required to file income tax returns and pay federal income taxes in-

[7] Presumably in light of the plain statutory language requiring trustees, fiduciaries, assignees and court officers of all descriptions to pay federal taxes (*see* pp. 12-14, 17-30, *infra*)—and the Bank's failure to disclose its intention that this trustee not abide by those statutes—the United States did not object to the Plan. In addition, the United States was not required to, and did not, file a proof of claim prior to the January 1985 "bar date" for the taxes that eventually would be due on the sale of the Miami Center. No income would be recognized until the actual sale, which took place in October 1985—months after the Plan was confirmed—and even then the large bulk of the taxes would not be due until October 15, 1986, when Holywell's federal income tax return for the tax year ending July 31, 1986 was due to be filed by the trustee.

[8] Although the trustee has never filed federal income tax returns, the Internal Revenue Service recently conducted an audit of Holywell's and Gould's estates. According to the agent's preliminary findings, the liabilities of the Holywell (for the tax year ending July 31, 1986) and Gould estates (for the tax year ending December 31, 1985), including penalties and interest, total more than $35 million. No audit of the later years has yet been completed.

[9] Therefore it appears quite clear that the Order confirming the Plan has now been unequivocally reversed, although it appears that the liquidation of the debtors' business affairs and property has de facto continued to be conducted under the Plan by the Trustee. The bankruptcy court has required the Bank to pay a $22 million judgment to MCJV under the Eleventh Circuit's mandate imposing that liability upon the Bank for wrongfully subordinating MCJV's interest in the proceeds from the sale of MCJV's property.

curred. Adversary Complaint ¶ 18 (Smith Br. in Opp. 6a). In the alternative, the trustee sought a declaration that the Bank should pay any such taxes because: (1) the Bank, presumably fraudulently, proposed the Plan without providing the means to pay the taxes; (2) the Bank, presumably fraudulently, failed to disclose the obligation to pay the taxes; and (3) the Bank had agreed to indemnify the trustee. *Id.*

The bankruptcy judge agreed that the trustee was not required to pay the taxes and asked counsel for the trustee to draft the opinion.[10] The primary rationale put forward in support of this unprecedented decision absolving the trustee of liability to pay federal income taxes was the somewhat circular proposition that "the liquidating trustee, being a creature of a contract, is a contract trustee." Pet. App. 32a; 85 Bankr. at 901. No source of law indicating any special attributes of, or special treatment for, a "contract trustee" was identified. Instead, the opinion simply stated "[i]f Congress had intended to hold a . . . contract trustee liable to file a tax return and to pay taxes, it could have explicitly provided for this . . . ."

[10] We are unaware whether the bankruptcy judge adopted the trustee's proposed opinion *verbatim* because counsel for the trustee submitted it to the bankruptcy judge *ex parte* and has thus far declined to provide petitioners with any information about his draft opinion or any modifications thereto. However, the bankruptcy judge in this case has made a practice of adopting *in toto* and *verbatim* the findings of fact and conclusions of law drafted by the victorious party. *E.g.*, Order Granting Bank of New York's Motion for Issuance of Trustee's Certificate (May 2, 1991) (Bankr. C.P. No. 2237), *stayed pending appeal, In re Holywell Corp. (United States* v. *Bank of New York)*, No. 91-953-CIV-RYSKAMP (S.D. Fla. May 16, 1991). In this regard, he has expanded upon the practice of his predecessor. *See, e.g., Miami Center Ltd. Partnership* v. *Bank of New York*, 838 F.2d at 1551 n.4; *Olympia & York Fla. Equity Corp. & Miami Center Joint Venture* v. *Bank of New York*, No. 85-3230-CIV-ATKINS, slip op. at n.3 (S.D. Fla. March 24, 1987). At least the first bankruptcy judge—who was recused from the case (after he confirmed the Bank's Plan) for bias against the debtors—solicited proposed findings from all parties, a practice that Judge Weaver, the current bankruptcy judge, apparently deems unnecessary.

Pet. App. 33a; 85 Bankr. at 901.[11] The district court affirmed in an unreported decision that adopted the same reasoning. Pet. App. 23a-24a.

Neither court addressed the trustee's alternative request for a declaration concerning the Bank's responsibilities, although the trustee continues to assert that in the event he is liable to pay the federal income taxes the Bank should be required to pay them. Indeed, this has become imperative for the trustee, since he has allowed the Bank to take over $27 million in postpetition interest on its "undersecured" claim and, in addition, has distributed over $30 million from the trust to creditors subordinate in right of payment to the United States without reserving sufficient funds for the payment of federal or state income taxes.

5. *The Court of Appeals' Decision.*—The United States and the debtors appealed. The court of appeals, in a split decision, affirmed. The majority wrote that "[b]y its terms, section 6012 refers only to trustees who are appointed under *Chapter* 11 of the Bankruptcy Code." Pet. App. 11a; 911 F.2d at 1545 (emphasis added). From this, the majority concluded, without discussion or citation, that section 6012 "was not intended to apply to a broad range of individuals without regard to the functions which they perform." Pet. App. 11a; 911 F.2d at 1545.

The majority did not discuss the other statutes that require a trustee or other fiduciary of an insolvent estate to pay federal taxes. 28 U.S.C. § 960; 31 U.S.C. § 3713. It relied exclusively on a case decided by a bankruptcy

[11] The opinion's conclusion that this is a case of the dog that did not bark in the night pointed to no indication (and we have found none) that Congress had ever heard of the term "contract trustee," or if so that it attached any significance to it, or felt that such a trustee was to be treated differently from any other trustee. Congress had passed a number of statutes exhibiting its unmistakable command and intention to subject *all* fiduciaries (including "trustees") dealing with insolvent estates to the payment of taxes. *See* pp. 12-14, 17-30, *infra*.

court under the now-repealed Bankruptcy Act of 1898.[12] *In re Alan Wood Steel Co.*, 7 Bankr. 697 (Bankr. E.D. Pa. 1980). The *Alan Wood Steel* case involved a disbursing agent under that Act, empowered by statute only to "'"distribute, subject to the control of the court, the consideration . . . deposited by the debtor."'"[13] The majority's characterization of the trustee in this case as a "disbursing agent" or "contract trustee," Judge Cox in dissent wrote, "denies the reality of [the trustee's] rights, duties and obligations under the Plan. A mere label does not magically transform the liquidation trustee into something he is not. In fact, his job description squarely fits within the Internal Revenue Code description of a 'fiduciary.'" Pet. App. 14a-15a; 911 F.2d at 1547.

The majority of the court felt compelled to answer the obvious question: if the trustee was not going to file tax returns and pay taxes on the gains on the property and the income on the cash in his hands, who was? It said:

> Our conclusion does not leave the government without the ability to collect taxes on the post-confirmation sale of property. It simply means that the reorganized debtor, not the liquidating trustee is responsible for such taxes.

Pet. App. 9a-10a; 911 F.2d at 1545.

The court did not furnish any authority for this proposition; it did not define who the "reorganized debtor" was; and it did not indicate who was to pay the taxes on the interest earned over the years upon the funds in the trustee's hands, invested as they were in certificates of deposit and other income-producing investments; but presumably the "reorganized debtor" was to do this too.

Finally, the court decided that the allegation of fraud contained in the trustee's complaint "is an attempt to

[12] Pub. L. 55-171, 30 Stat. 544, *amended by* Chandler Act, Pub. L. 75-696, 52 Stat. 840 (1938), *repealed by* Bankruptcy Reform Act of 1978, Pub. L. 95-598, § 401(a), 92 Stat. 2549, 2682.

[13] Pet. App. 15a; 911 F.2d at 1547 (quoting 7 Bankr. at 701, quoting, in turn, former 11 U.S.C. § 737(1) (1976)).

modify or alter the Plan and is therefore barred under the mootness doctrine." Pet. App. 6a; 911 F.2d at 1543. The court relied on its earlier decision dismissing the debtors' appeal of the confirmation order. *Miami Center Limited Partnership* v. *Bank of New York*, 838 F.2d at 1553. However, the court refused to apply the "mootness doctrine" to the question whether the trustee was required by statute to pay federal income taxes, finding that raising this question was "not an attempt to modify or alter the Plan." Pet. App. 7a; 911 F.2d 1544.

6. *Subsequent Developments.*—Since the decision of the court of appeals, the trustee has continued to operate under bankruptcy court supervision. On January 31, 1991, he obtained bankruptcy court "approval" to disburse millions of dollars from the trust.[14] Since then, he has also, among other things, sought and obtained bankruptcy court approval purporting to authorize him to:

—employ "special counsel" before this Court;

—pay out of the trust funds his counsel's fees incurred in fighting his duty to pay federal taxes;

—consummate a settlement he reached requiring the payment of several million dollars in property taxes to Dade County, Florida; and

—compromise other private litigation.

The trustee today has in his possession approximately $25 million in trust funds, of which about $18 million represents income received on the funds in his hands or otherwise on behalf of the estates in his custody.[15]

[14] Justice Kennedy denied the debtors' application for reinstatement of the court of appeals' stay and injunction, which had prevented the trustee from disbursing funds from the trust during the pendency of the appeal. No. A-546 (January 22, 1991). The stay and injunction automatically terminated upon issuance of the court of appeals' mandate. The United States did not seek reinstatement of the stay and injunction.

[15] Except for the United States, all the debtors' third-party creditors who filed claims in the bankruptcy court have been paid 100 cents on the dollar for such claims.

SUMMARY OF ARGUMENT

The court of appeals' decision presents a misapplication of a matrix of federal statutes designed to insure that federal taxes are paid by the fiduciaries of insolvent business entities and individuals. By holding the trustee in this case exempt from those statutes, the court of appeals has created a tax loophole available in a broad spectrum of cases. Its decision is contrary to the plain language of the statutes, to the purposes of the tax and bankruptcy laws, and to this Court's decisions.

Dating from the First Congress, the clear and consistent purpose of federal statutory law has been to make certain that all assignees, trustees, receivers, and fiduciaries of insolvent estates (whether or not appointed by a court) assume and discharge a duty to pay federal taxes on the operations or income of their estates. Today, there are several statutes on the books to carry out that long-standing national policy. 28 U.S.C. § 960; 31 U.S.C. § 3713; I.R.C. § 6012(b). The statutes' sweeping language is designed to cover such fiduciaries regardless of the mechanism of their appointment. Indeed, this Court has confirmed in several cases involving bankruptcy liquidations that each of these statutes requires the payment of federal taxes by a trustee appointed by a bankruptcy court for the purpose of liquidating a debtor's assets. The statutes are single-minded and, to an extent, redundant because they are the embodiment of Congressional commands at different dates; but they are consistent and do not leave open the loophole contended for.

First, section 960 of the Judicial Code subjects "any officers and agents conducting any business under authority of a United States court" to "all Federal, State and local taxes applicable" to the business. This Court recently held that section 960 requires a bankruptcy trustee to pay state taxes "on the liquidation process." *California State Bd. of Equalization* v. *Sierra Summit, Inc.*, 490 U.S. 844, 853 (1989). Other decisions of this Court confirm that section 960's plain language applies

to a broad spectrum of court officers. Of course, section 960 applies uniformly to "all Federal, State and local taxes." The point has been well summarized:

> In [*Sierra Summit*, the Court] concluded that Sec. 960 evinces Congress's intention that a business conducted under court order, whether in bankruptcy or state-court receivership, be subject to the same taxes it would have been had it been in the possession of the owner . . . . [including taxes on] [p]roperty purchased at a bankruptcy liquidation sale . . . .

F. Carter & J. Anderson, "Sales & Use Taxes Can Be Imposed on Liquidation of Bankrupt's Estate," *The Bankruptcy Strategist* 3, 6 (July 1989).

Second, the absolute priority statute, derived from legislation enacted by the First Congress and on the statute books in substantially its present form since the early nineteenth century, requires that the claims of the United States with respect to "a person indebted to the Government" who is insolvent and is divested of his property in various enumerated ways—including through a bankruptcy process—must be paid "first" by the insolvent person's representative. 31 U.S.C. § 3713(a). The statute has been given a consistent and broad interpretation through over a century and a half of construction by this Court. To assure compliance, the statute (in a provision dating from 1799) provides that "a representative" of the insolvent paying any part of a debt before the claim of the United States is personally liable, to the extent of that payment, for the unpaid claims of the United States.

In *King* v. *United States*, 379 U.S. 329, 338 (1964), this Court held that the then-effective version of section 3713 applied even to a disbursing agent under section 337(1) of the former Bankruptcy Act. The Court rejected the disbursing agent's argument that he was not liable for the payment of taxes because he performed "only the ministerial function of paying out the deposited funds in conformity with the court's orders." *Id.*

Third, section 6012(b)(3) of the Internal Revenue Code provides that "[i]n a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation," the fiduciary must file federal tax returns. Section 6012(b)(4) requires the same of a "fiduciary" (which is defined by section 7701 to include a "trustee") of "an estate, a trust, or an estate of an individual under Chapter 7 or 11 of title 11." Section 6151(a) requires the person making the return to pay the tax. The plain, sweeping language of section 6012(b) also brings the trustee within the statute's ambit, requiring him to file federal tax returns and pay the taxes. In *Nicholas* v. *United States*, 384 U.S. 678, 693-94 & n.27 (1966), this Court held that a trustee appointed by a bankruptcy court to liquidate a corporation was indeed subject to penalties imposed by the Internal Revenue Code for his failure to fulfill his "duty to seek out and pay taxes accruing against the bankrupt estate during the bankruptcy itself."

Since 1978, section 3713 has contained an exception for "a case under title 11," which interlocks with that part of section 6012(b)(3) covering a "trustee in a case under title 11." If, as respondents[16] have argued, section 6012(b)(3)'s provision covering a "trustee in a case under title 11" does not apply to this trustee, section 3713(a) covers him and section 3713(b)'s exception from its personal liability provision similarly does not protect him. The exception for "a case under title 11" was added to section 3713 when the bankruptcy laws were revised in 1978; and the identical language was added to section 6012(b) when the tax laws were amended in 1980 to comport with the bankruptcy revisions. The identical language in these two statutes (enacted as part

[16] Although the United States is technically a respondent in No. 1361, *see* S. Ct. R. 12.4, we shall use the term "respondents" to refer solely to the Bank and the trustee.

of a comprehensive treatment of one subject) thus requires a uniform application.

The trustee cannot have it both ways—he either is, or is not, a trustee "in a case under title 11." Of course, if respondents are correct that he is not a trustee "in a case under title 11," then section 960, section 3713(a) and the other provisions of section 6012(b) still require him to pay the federal taxes—with the added incentive of absolute, statutory, personal liability for his failure to do so. As we develop below, the most logical construction of these interlacing and related statutes is that section 3713(a) applies wherever the system of priorities in section 507 of the Bankruptcy Code does not apply, and that this case should be governed, as to the Government's rights of priority by section 3713(a), and as to the trustee's personal liability by section 3713(b).

In short, the language of these three statutes—as confirmed by this Court and heretofore uniform court of appeals decisions—covers all insolvency fiduciaries, however appointed, rightfully or wrongfully, and, if in bankruptcy, at whatever stage in the proceedings appointed and by whatever authority. The statutory scheme works routinely when normal bankruptcy procedures are followed. Ordinarily, taxes incurred by a bankruptcy estate or corporation in bankruptcy during the administration phase of the case are given administrative expense priority under the Bankruptcy Code. 11 U.S.C. §§ 503(b)(1)(B); 507(a)(1). Here, however, the court of appeals held that the taxes could not be recovered as administrative expenses because they were "post-confirmation taxes." Pet. App. 9a; 911 F.2d at 1544. By using the "liquidating trust"—instead of liquidating the debtors in the proceeding itself, or requiring the debtors-in-possession to convey title to the Miami Center to the Bank—the Plan, according to the court of appeals, transmuted what otherwise would have been a priority claim solely against the estates into a claim against the "reorganized debtor[s]" after all of their property had been stripped from them and vested in the trustee.

But the matrix of statutes operates sweepingly in a nonroutine situation such as the scheme involved here. As the dissent below recognized, the court of appeals' decision erroneously "encroaches upon the IRS's ability to collect taxes successfully" (Pet. App. 16a; 911 F.2d at 1547) and vitiates the fresh start contemplated by the Bankruptcy Code—the debtors would emerge from bankruptcy, in respondents' view, with no assets, no visible means of generating income, and millions of dollars of federal income tax liability.

Recognizing the indefensibility of their extremist position—and of the court of appeals' opinion—respondents put forward (and presumably will renew) two side issues in opposition to certiorari. Respondents first contended that the debtors were grantors of a grantor trust. The court of appeals declined without comment to adopt that wholly unmeritorious argument. As the one court of appeals that has examined the question has concluded, the grantor trust rules were simply never intended to apply in bankruptcy. *DePinto* v. *United States*, 585 F.2d 405, 407 (9th Cir. 1978).

Respondents' second contention, that the case is somehow moot, is equally without merit. The bankruptcy "mootness doctrine" is a congressional regulation of the jurisdiction of Article III courts and of substantive bankruptcy law by way of a statutory requirement that the "validity" of certain sales by bankruptcy courts cannot be "affect[ed] by reversal on appeal. 11 U.S.C. § 363(m). *See In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1084-86 (3d Cir. 1990); *In re AOV Indus.*, 792 F.2d 1140, 1146-50 (D.C. Cir. 1986).

According to respondents, the debtors' failure to post a $50 million supersedeas bond in appealing the confirmation of the Bank's "cram-down" Plan immunizes the trustee from the obligations imposed on him by three federal statutes. That is absurd. A plan of reorganization simply cannot immunize a fiduciary operating under a plan from the operation of general federal statutory

law. Otherwise, the potential for abuse would be overwhelming—a host of federal statutes would be subject to a "bankruptcy exception" heretofore uncontemplated by Congress. A proponent may not propose a plan which does not comply with law and which enriches it to the detriment of the public fisc or by noncompliance with general statutory commands and then claim immunization by reason of the consummation of the plan. The court of appeals did not undertake to extend its "mootness doctrine" to the lengths respondents suggest. It addressed the merits of the case, as should this Court.

ARGUMENT

I. THE TRUSTEE IS RESPONSIBLE FOR THE PAYMENT OF FEDERAL INCOME TAXES AS A FIRST PRIORITY.

1. *The Interlacing Statutes.*—The plain language of three federal statutes requires the trustee to pay federal income taxes on the liquidation process. Section 960 of the Judicial Code applies to "any officers and agents conducting any business under authority of a United States court." Section 3713 of title 31 covers all representatives of insolvent persons, except in "a case under title 11." Section 6012(b)(3) of the Internal Revenue Code covers various fiduciaries with control over corporate assets by court order, by operation of law, or otherwise; and section 6012(b)(4) covers fiduciaries of trusts, estates and individuals in bankruptcy.

To some extent these statutes are overlapping and certain of them contain exceptions for cases covered by others of them. The priority of the United States may be affected by the decision as to which of the statutes are applicable in a particular case, and the personal liability of the fiduciary may be affected as well. We respectfully suggest that the Court rest its decision on the broadest of the applicable statutes, in order to prevent replication of the present scheme in other cases, to provide the high-

est level of priority for the United States,[17] and to promote compliance with our nation's voluntary system of taxation by giving trustees the added deterrent of personal liability for their failure to pay federal taxes. Such a choice would also further the collection of the taxes in this case, for the trustee has dissipated the trust assets and has not reserved sufficient funds for the payment of federal taxes. That would invoke taking respondents at their words that the trustee is not a "trustee in a case under title 11." The trustee should, of course, still be held to be bound by the provisions of section 960 of the Judicial Code, the absolute priority statute (31 U.S.C. § 3713), and the more general provisions covering "assignees" and other fiduciaries in I.R.C. § 6012(b)(3) and (4).

(a) *Section 960.*—Section 960 of the Judicial Code defines the standard of conduct for "any officers and agents conducting any business under authority of a United States court," requiring them to pay "all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation." 28 U.S.C. § 960. (Here, of course, I.R.C. §§ 1 and 11 impose the applicable taxes.) The court of appeals did not even acknowledge the statute's existence. This Court's decisions, however, and the legislative history confirm the clear congressional intent to subject a trustee like this one to federal income taxes.

The Court recently had occasion to speak to the applicability of section 960 to trustees appointed by bankruptcy courts in *California State Board of Equalization* v. *Sierra Summit, Inc.*, 490 U.S. 844 (1989). The Court examined closely the language and history of section 960 and concluded that "[n]othing in the plain language of the statute, its legislative history, or the structure of the Bankruptcy Code indicates that Congress intended to exclude taxes on the liquidation process from those taxes

[17] Except in cases where the more complex series of priorities ordained by sections 503 and 507 of the Bankruptcy Code has clearly been provided.

the States may impose on the bankrupt estate." 490 U.S. at 853. The Court added, "'[b]y the sweeping terms of this statute all doubts have been resolved in favor of the state taxes.'" 490 U.S. at 858 n.9 (quoting *Thompson* v. *Louisiana*, 98 F.2d 108, 111 (8th Cir. 1938)). Since section 960 applies universally to "all Federal, State and local taxes," it requires a trustee appointed by a bankruptcy court in a plan under chapter 11 to pay federal income taxes "on the liquidation process." *Sierra Summit* thus interpreted the "plain meaning" of the language "conducting any business" as embracing the operations of liquidating a business or the estate of an entity conducting a business. 490 U.S. at 851.[18]

Other decisions of this Court confirm that the statute's plain language applies generally to taxation of all activities of all officers operating businesses under federal court authority, without exception. The Court first addressed the statute in 1939. Writing for a unanimous Court, Justice Black—who, as a Senator, was present when the Act was considered and passed in 1934[19]—recognized the broad applicability of the statute:

> Congress has here with vigor and clarity declared that a trustee and other court appointees who operate businesses must do so subject to State taxes "the same as if such business[es] were conducted by an individual or corporation." . . . The Act of 1934 indicates a Congressional purpose to facilitate—not to obstruct—enforcement of State laws . . . .

Boteler v. *Ingels*, 308 U.S. 57, 61 (1939).[20]

[18] The Court in *Sierra Summit* also reviewed lower court authority and indeed reversed one of the cases upon which respondents relied in the court of appeals in this case and overruled several others. 490 U.S. at 846 n.2.

[19] 78 Cong. Rec. 11,466 (1934).

[20] In a footnote, the Court reserved the question "[w]hether the trustee might be personally surcharged because [of] his refusal to pay the fees." 308 U.S. at 60 n.6. Until now, the Court still has not had occasion to speak to the prospect of such liability arising out of a violation of section 960. However, it appears that such liability

In *Palmer* v. *Webster & Atlas National Bank*, 312 U.S. 156, 163 (1941), the Court reaffirmed that "Congress intended . . . that a business in receivership, or conducted under court order, should be subject to the same tax liability as the owner would have been if in possession and operating the enterprise." [21]

The legislative history confirms Congress' sweeping intent in passing and revising this statute. The committee reports reflected Congress' displeasure with a federal court ruling that held federal court receivers exempt from state taxes. The reports concluded that "[n]o good reason is perceived why a receiver should be permitted to operate under such an advantage as against his competitors not in receivership, and the States and local governments be deprived of this revenue." [22] The 1934 Act therefore subjected a "receiver, liquidator, referee, trustee, or other officer or agent appointed by any United States court" to "all State and local taxes." Act of June 18, 1934 (formerly codified at 28 U.S.C. § 124a (1940)).

When Congress revised the Judicial Code in 1948, it made two changes to the language of the statute. First,

would further the purposes of section 960 by encouraging voluntary compliance with the federal tax laws, consistent with the common law duties of trustees. *See* p. 33 n.38, *infra*. The point need not be reached if section 3713 is found to apply, because of the absolute personal liability provisions contained therein.

[21] In *Palmer*, the Court held that the trustees, who were administering two bankrupt estates (312 U.S. at 160), could not use the assets of one estate to pay the taxes of another. 312 U.S. at 163. Here, the trustee is responsible for five separate estates, and should not be permitted to use the assets of one to pay the taxes of any other, except to the extent that the modified form of substantive consolidation approved by the bankruptcy court (*see* p. 4 n.5, *supra*) permits the use of Holywell's funds after all of Holywell's creditors, including the United States and Virginia, have been paid.

[22] H.R. Rep. No. 1138, 73d Cong., 2d Sess. 1 (1934); S. Rep. No. 1372, 73d Cong., 2d Sess. 1 (1934). The bill was amended on the House floor without debate to apply not only to receivers but to a "liquidator, referee, trustee, or other officer or agent." 78 Cong. Rec. 6,656 (1934).

Congress deleted the specific enumeration of "receiver" "liquidator," "referee" and "trustee" as redundant. H.R. Rep. No. 308, 80th Cong., 1st Sess. 5, A103. This only confirms that the words "any officers and agents" mean what they say, and that any limitation would be contrary to congressional intent.

Second, Congress added "Federal" taxes to the coverage of the statute, "in recognition of the liability of such officers [*i.e.*, "any officers"] for Federal taxes under the revenue laws." *Id.* Thus, in 1948, Congress recognized the repeated expressions of congressional intent that subject "*any* officers and agents conducting any business under authority of a United States court" to federal taxes, and ensured that section 960 would define the standard of conduct for court-appointed officers with respect to federal, as well as state and local, taxes.

(b) *The Absolute Priority Statute.*—The overriding intent of Congress that *all* fiduciaries of insolvent entities bear responsibility for federal taxes is further demonstrated by 31 U.S.C. § 3713, which is older than the Bill of Rights and almost as old as the Constitution itself.[23] That statute mandates that, where "a person indebted to the Government is insolvent" and "an act of bankruptcy is committed," [24] a claim of the United States "shall be

[23] Its predecessor was the fifth statute passed by the First Congress, Act of July 31, 1789, ch. 5, § 21, 1 Stat. 29, 42, "and its roots reach back even further into the English common law; the Crown exercised a sovereign prerogative to require that debts owed it be paid before the debts owed other creditors. Many of the States claim the same prerogative, as an inherent incident of sovereignty." *United States* v. *Moore*, 423 U.S. 77, 80 (1975) (citations omitted).

[24] The concept of "acts of bankruptcy" (not found in the Bankruptcy Code of 1978) derives from the old Bankruptcy Act of 1898 and its predecessors and the laws of the states during periods when there was no federal bankruptcy act. *Bramwell* v. *United States Fidelity & Guaranty Co.*, 269 U.S. 483, 489 (1926); *United States* v. *Oklahoma*, 261 U.S. 253, 262 (1923); *Conard* v. *Nicoll*, 29 U.S. (4 Pet.) 291, 308 (1830) (charge of Washington, Circuit Justice, reprinted by order of the Court). The debtors' filing of voluntary cases in bankruptcy satisfies this requirement of section 3713(a), because

paid first." 31 U.S.C. § 3713(a)(1)(A)(iii). To ensure compliance, the statute historically in substance has provided—as its current text expressly provides—that "[a] representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government." 31 U.S.C. § 3713(b).

"Since the earliest days of the republic, [section 3713] and its predecessors have given the Government priority over all other claimants in collecting debts due it from insolvent debtors." *United States* v. *Key*, 397 U.S. 322, 324 (1970). The Court has consistently given this statute a liberal construction in order to ensure the flow of the public revenues:

> As Mr. Justice Story wrote for the Court in 1832, the priority proceeds from "motives of public policy, in order to secure an adequate revenue to sustain the public burthens and discharge the public debts. . . . [A]s that policy has mainly a reference to the public good, there is no reason for giving to [the statute] a strict and narrow interpretation." For nearly two centuries this Court has applied the statute with this policy in mind.

United States v. *Moore*, 423 U.S. at 81-82 (quoting *United States* v. *State Bank*, 31 U.S. (6 Pet.) 29, 35 (1832)); *accord, e.g., United States* v. *Emory*, 314 U.S. at 426; *Bramwell* v. *United States Fidelity & Guaranty Co.*, 269 U.S. at 487; *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.).

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it was the sixth "act of bankruptcy" under section 3.a(6) of the old Act (former 11 U.S.C. § 21.a(6) (1976)); *see also United States* v. *Texas*, 314 U.S. 480, 483 (1941) (act of bankruptcy under this statute clearly includes appointment of receiver to liquidate business); *United States* v. *Emory*, 314 U.S. 423, 426 (1941) (same). Unless the old Act's definitions are used (or the Court's earlier decisions interpreting "act of bankruptcy"), section 3713(a)(1)(A)(iii) would be a nullity.

The manner in which the statute operates has been well described in a case decided over a century and a half ago, when the statute (apart from the exception for the Bankruptcy Code) had the same structure as it now has:

> From the language employed in this section, and the construction given to it, from time to time, by this Court, these rules are clearly established: first, that no lien is created by the statute: secondly, the priority established can never attach while the debtor continues the owner and in the possession of the property, although he may be unable to pay all his debts: thirdly, no evidence can be received of the insolvency of the debtor, until he has been divested of his property in one of the modes stated in the section: and fourthly, whenever he is thus divested of his property, the person who becomes invested with the title, is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property.

Beaston v. *Farmers' Bank*, 37 U.S. (12 Pet.) 102, 133-34 (1838).[25]

The Court held this statute to persist in the presence of other, later enacted specific statutes, including the Bankruptcy Act of the day. *See, e.g., United States* v. *Key*, 397 U.S. at 325-27 (Chapter X, added by the Chandler Act of 1938 to the Bankruptcy Act of 1898). Indeed, in *King* v. *United States*, 379 U.S. 329, 338-39 (1964), following the principle that the statute should be applied to all assignees of insolvents, this Court held the statute applicable to a disbursing agent under the Bankruptcy Act of 1898. Like respondents here, King argued that he performed "only the ministerial function of paying out the deposited funds in conformity with the court's orders." 379 U.S. at 338. The Court rejected that argument as counter to the actual power King possessed. The powers of the trustees here (*see* pp. 5-6, *supra*), not only

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[25] *Beaston* has been quoted and paraphrased by this Court in the present century. *Bramwell* v. *United States Fidelity & Guaranty Co.*, 269 U.S. at 488; *King* v. *United States*, 379 U.S. at 336-38.

equalled but far outstripped those of the disbursing agent in *King* and thus the present case is an *a fortiori* one from that case. In addition, King—like respondents here—argued that he was not responsible to pay the Government's claim because the bankruptcy court's order confirming the plan of arrangement did not provide for payment of the claim. 379 U.S. at 338-39. The Court rejected that argument, as well, in light of the "degree of control" that King possessed. 379 U.S. at 339.

(c) *I.R.C. Section 6012(b)*.—Congress' "recognition" in 1948, that "any officers and agents conducting any business under authority of a United States court" were liable "for Federal taxes under the revenue laws" (*see* p. 21, *supra*), was supported by the plain language of a statute that had not been materially altered since the passage of the Sixteenth Amendment; by the Treasury Department's long-standing and unequivocal interpretation of the statute; and by uniform federal court application of the statute.

In 1948, section 6012(b)(3)'s predecessor applied to "receivers, trustees in bankruptcy, or assignees" who were "operating the property or business of corporations." Internal Revenue Code of 1939, § 52. Today, the statute remains substantially unchanged.[26] It is part of section

6012, which identifies the persons required to make returns. Subsection (a) prescribes the general and familiar rule requiring individuals, corporations, estates, trusts, and other entities to make returns. Subsection (b) then prescribes rules for the filing of returns by "fiduciaries and receivers"—in cases of decedents (§(b)(1)); persons under a disability (§(b)(2)); corporations whose assets are held by receivers, trustees or assignees (§(b)(3)); and estates, trusts and estates of individuals under chapter 7 or 11 of title 11 (§(b)(4)).

Within this structure, Congress provided in subsection (b)(3) for the filing of returns for a corporation where substantially all of its assets are held by a fiduciary. Section 6012(b)(3) therefore applies broadly in any case "where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation." I.R.C. § 6012(b)(3). A fiduciary within the ambit of the statute's language must file the corporation's federal income tax returns "in the same manner and form as corporations are required to make such returns," and, by operation of I.R.C. § 6151(a), pay the taxes. Although subsection (b)(3) is limited to corporations, subsection (b)(4) provides that "[r]eturns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 shall be made by the fiduciary thereof."[27]

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[26] Two revisions have since been made to the language. The first took place in 1954. Prior to that time, a minority of courts had held that "mere" liquidation activities did not constitute "operating" the business under the statute. *E.g., In re Heller, Hirsch & Co.*, 258 F. 208 (2d Cir. 1919); *In re Owl Drug Co.*, 21 F. Supp. 907 (D. Nev. 1937). As noted above, this Court later reached the conclusion that liquidation activities constitute "conducting" a business under section 960. *See* p. 19, *supra*. In the 1954 Code, Congress made a "clarifying change from the wording of existing law" (H.R. Rep. No. 1337, 83d Cong., 2d Sess. A396, *reprinted in* 1954 U.S. Code Cong. & Admin. News 4017, 4543; S. Rep. No. 1622, 83d Cong., 2d Sess. 563, *reprinted in* 1954 U.S. Code Cong. & Admin. News 4621, 5211) by eliminating the language "operating the business or property of corporations" from the statute and instead providing that section 6012(b)(3) would apply "whether or not such property is being operated." This change was thus intended to confirm the broad reach and intention of the statute.

Second, as part of the Bankruptcy Tax Act of 1980, the words "trustees in bankruptcy" were replaced with "trustee in a case under title 11 of the United States Code." This was a "conforming amendment" made "to substitute references to bankruptcy cases under new title 11 of the U.S. Code for references to bankruptcy proceedings under the now-repealed Bankruptcy Act." S. Rep. No. 1035, 96th Cong., 2d Sess. 52, *reprinted in* 1980 U.S. Code Cong. & Admin. News 7017, 7065.

[27] Section 6012(b)(4)'s predecessors required the fiduciary of an "estate" or a "trust" to make returns. *See, e.g.*, section 142(a) of

The sweeping language of these two provisions thus gives explicit instructions to fiduciaries of all descriptions that they must report the income of their charges and pay the concomitant federal taxes. I.R.C. § 6151(a).

This interpretation of the statute is supported by long-settled court of appeals authority. Since the passage of the statute shortly after the enactment of the Sixteenth Amendment, the courts of appeals, with the singular exception of the Eleventh Circuit in this case, have required fiduciaries—however they come into control of corporations' or individuals' assets and whatever their formal titles—to file federal income taxes.[28] As Judge

the Internal Revenue Code of 1939; section 6012(b)(4) of the Internal Revenue Code of 1954. In 1980, Congress added language imposing the same requirement on the fiduciary of "an estate of an individual under chapter 7 or 11 of title 11." Pub. L. 96-589, § 3(b)(2), 94 Stat. 3389, 3401.

[28] *See In re Joplin*, 882 F.2d 1507, 1508 (10th Cir. 1989) (trustee appointed in individuals' chapter 7 liquidation proceeding); *In re Sapphire S.S. Lines*, 762 F.2d 13, 14 (2d Cir. 1985) (trustee appointed in bankruptcy case); *In re I.J. Knight Realty Corp.*, 501 F.2d 62, 64 (3d Cir. 1974) (trustee appointed in bankruptcy case); *United States* v. *Sampsell*, 266 F.2d 631, 632-34 (9th Cir. 1959) (same); *Hersloff* v. *United States*, 310 F.2d 947, 950 & n.5 (Ct. Cl. 1962) (liquidating trustees), *cert. denied*, 373 U.S. 923 (1963) [decisions of the Court of Claims issued prior to the creation of the Federal Circuit are binding in that Circuit, *South Corp.* v. *United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982) (in banc)]; *United States* v. *Loo*, 248 F.2d 765, 768 (9th Cir. 1957) (trustee appointed by state court), *cert. denied*, 356 U.S. 928 (1958); *Pinkerton* v. *United States*, 170 F.2d 846, 847-48 (7th Cir. 1948) ("liquidating receiver" appointed by state court); *Louisville Property Co.* v. *Commissioner*, 140 F.2d 547, 549-50 (6th Cir.) (court-ordered receiver for purposes of liquidation), *cert. denied*, 322 U.S. 755 (1944); *Kavanagh* v. *First Nat'l Bank*, 139 F.2d 309, 312 (6th Cir. 1943) (receiver of insolvent national bank); *First Nat'l Bank* v. *United States*, 86 F.2d 938, 941 (10th Cir. 1936) (trustee for corporation); *Northwest Utils. Sec. Corp.* v. *Helvering*, 67 F.2d 619, 620 (8th Cir. 1933) ("trustees in dissolution"), *cert. denied*, 291 U.S. 684 (1934); *Scott* v. *Western Pac. R.R.*, 246 F. 545 (9th Cir. 1917) (receiver appointed by federal court) (dictum); *see also Tazewell Elec. Light & Power Co.* v. *Strother*, 84 F.2d 327, 329 (4th Cir. 1936) ("liquidating trustee" covered by regulations promulgated under statute); *Whitney Realty Co.* v. *Commissioner*, 80 F.2d 429, 431 (6th Cir. 1935) (same for "liquidating agent"), *cert. denied*, 298 U.S. 668 (1936); *Hellebush* v. *Commissioner*, 65 F.2d 902, 903 (6th Cir. 1933) (same for trustees appointed to effect "final liquidation"); *Taylor Oil & Gas Co.* v. *Commissioner*, 47 F.2d 108, 109 (5th Cir.) (same for "liquidating trustees"), *cert. denied*, 283 U.S. 862 (1931).

Jerome Frank once observed in discussing the applicability of this statute to one corporation in the process of liquidation, "[p]etitioner suggests no reason why its position should be held so anomalous that it does not fit into a framework in which business units of every description, of long or short duration, must share in the cost of society. This is the price of existence." *O'Sullivan Rubber Co.* v. *Commissioner*, 120 F.2d 845, 847 (2d Cir. 1941). Like the petitioner in *O'Sullivan Rubber*, the Eleventh Circuit offered no reason why a "liquidating trustee" should be treated differently from any other fiduciary. Thus, there can be no question that section 6012 (b) covers the trustee here both as to the corporate and the individual debtors.

(i) *The Corporations*—First, as Judge Cox pointed out in his dissent, the trustee here is an "assignee, by order of a court of competent jurisdiction, by operation of law or otherwise," of the debtors' property and, as such, is required to file the corporate debtors' returns under section 6012(b)(3). This portion of the statute's language is sweeping and compelling, with no limiting language restricting the term to only certain kinds of assignees, and myriad courts of appeals have held the statute applicable to a wide variety of court-appointed and contractually designated assignees, regardless of the method of their acquisition of the corporation's assets. *See* pp. 26-27 n.28, *supra*. Simply put, the statutory coverage of "an assignee, by order of a court of competent jurisdiction, by operation of law or otherwise" is not susceptible to an exception for a "contract trustee."

The majority in the court of appeals struggled with the question whether the trustee here was a "trustee in

a case under title 11," and respondents continued to contend he is not in opposing certiorari. Given the structure of section 6012(b)(3) with its broad and inclusive references to assignees and receivers—fiduciaries who acquire possession of the assets or estates of financially troubled corporations either by court order or by private arrangement—the question appears to be beside the point, and need not be reached. Of course, the bankruptcy court's jurisdiction, as here pertinent, extends only to "cases under title 11." 28 U.S.C. §§ 157(b), 1334. And this trustee was called a "trustee"—and section 1123 (a)(7) of the Bankruptcy Code contemplates the possibility of the selection of a "trustee" under a plan of reorganization, although it is far from clear that this section *properly* authorized the appointment here. Thus, it could hardly be said that the trustee *in no way* was a "trustee in a case under title 11."

But let us assume respondents' point for the sake of argument; it does not change the result. This clearly was no conventional trustee in bankruptcy; he did not function during the administrative phase of the case. To be sure, while the powers, functions and duties of the trustee in this Plan crafted by the Bank (including the emulation of the fidelity bond required by section 322(a) of the Bankruptcy Code) were chosen to emulate the powers, functions and duties of a trustee appointed for the administration of an ongoing bankruptcy case, it is the case that when the trustee was appointed and took over the property of the debtors, the Plan had been confirmed; that is the usual point where a trustee is discharged rather than when he takes office. But, even if this particular provision of section 6012(b)(3) does not reach this trustee, other provisions of that subsection—those referring to assignees and receivers, in an inclusive form—do so (as to the corporate debtors); as noted above, section 960 of the Judicial Code also reaches this trustee; and so does section 3713 of title 31.

That the trustee here is covered by the plain language of section 6012(b)(3) as to the corporate debtors is con-

firmed by the history of the statute, and thus, without reference to whether he was technically a "trustee in a case under title 11." Beginning with section 13(c) of the Revenue Act of 1916,[29] Congress required "receivers, trustees in bankruptcy, or assignees" to file the federal income tax returns of the corporations they were responsible for. This section has been reenacted in every subsequent recodification of the internal revenue laws and is part of the present Internal Revenue Code.[30] The regulations of the Treasury Department promulgated in 1919, under the first reenactment of the provision, construed the statutory language to cover "trustees in dissolution." [31] Article 547 of Treasury Regulation 45 (1920 ed.) explained:

> When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss.[32]

This contemporaneous administrative construction, which has never been modified in the numerous reenactments of

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[29] Pub. L. 64-271, 39 Stat. 756, 771.

[30] The relevant statutory provisions ranged from section 239 of the Revenue Act of 1918, Pub. L. 65-254, 40 Stat. 1057, 1081, to section 52 of the Internal Revenue Code of 1939, Pub. L. 76-1, 53 Stat. 1, 27-28.

[31] Treas. Reg. 45, art. 622 (1919); *accord* Treas. Reg. 62, art. 622 (1922 ed.); Treas. Reg. 65, art. 622 (1924); Treas. Reg. 69, art. 622 (1926); Treas. Reg. 74, art. 392 (1931); Treas. Reg. 77, art. 392 (1933); Treas. Reg. 86, art. 52-2 (1935); Treas. Reg. 94, art. 52-2 (1936); Treas. Reg. 111, § 29.52-2 (1943); Treas. Reg. 118, § 39.52-2 (1953); Treas. Reg. § 1.6012-3(b)(4) (1960). The present regulation, Treas. Reg. § 1.6012-(3)(b)(4) (1990), also interprets section 6012(b) as applying to "trustees in dissolution."

[32] *Accord* Treas. Reg. 62, art. 548; Treas. Reg. 65, art. 548; Treas. Reg. 69, art. 548; Treas. Reg. 74, art. 71; Treas. Reg. 77, art. 71; Treas. Reg. 86, art. 22(a)-21; Treas. Reg. 94, art. 22(a)-21; Treas. Reg. 111, § 29.22(a)-20; Treas. Reg. 118, § 39.22(a)-20.

the statute, provides express evidence of specific intent that section 6012(b) requires any officer appointed "for the purpose of liquidating the assets and paying the debts" of a corporation to file federal income tax returns and pay federal taxes regardless of the mechanism of the trustee's appointment.[33]

(ii) *The Individual Debtor*—While section 6012(b)(3) requires the trustee to file the corporations' returns, subsection (b)(4) operates in much the same way with respect to the individual returns involved here. The trustee was appointed as the fiduciary of a trust and took possession of all of the assets of the estate of Theodore B. Gould, as it existed at the commencement of the case. He has received millions of dollars of income in respect of the fiduciary estate. Therefore, the trustee is a "fiduciary" of a "trust" within the meaning of section 6012(b)(4) and must file returns reflecting the income attributable to assets comprising the estate of Gould, as well as the returns of the corporations. The Internal Revenue Code defines a "fiduciary" to include "a guardian, trustee, executor, administrator, receiver, conservator, or *any person acting in any fiduciary capacity for any person*." I.R.C. § 7701(a)(6) (emphasis added). Neither the majority of the court of appeals nor the respondents have offered any reason why this "trustee," as a "fiduciary" of a "trust" is not (as Judge Cox recognized in his dissent, Pet. App. 15a; 911 F.2d at 1547) covered by the explicit language of section 6012(b)(4).[34]

[33] Where Congress has, in many reenactments of a tax statute, declined to override a contemporaneous and long-continued administrative construction, the construction "must be deemed to have received congressional approval" and to have the effect of law. *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272, 283 (1966); *see Wilmette Park Dist.* v. *Campbell*, 338 U.S. 411, 417-18 (1949); *Helvering* v. *Winmill*, 305 U.S. 79, 83 (1938).

[34] In addition, the trustee should be covered by the requirement that the fiduciary of "an estate of an individual under Chapter 7 or 11" file returns. It is true that the "estate of an individual under Chapter 11" terminated in this case upon confirmation of the Plan of Reorganization. But the clear purpose of the statute is to bring within its scope all situations where persons control substantially all of the assets of another. The trustee should not be permitted to escape that broad purpose because he was appointed after administration of the estate terminated.

(d) *The Interaction Between the Absolute Priority Statute and Title 11 of the Bankruptcy Code.*—There is an exception in section 3713(a), the substantive portion of the absolute priority statute, for "a case under title 11," and in subsection (b) of section 3713, the personal liability provision, for "a trustee acting under title 11." These related exceptions came into the statute in 1978. The references in the exceptions to a case under title 11 and to a trustee acting thereunder are references to a bankruptcy or reorganization trustee in the usual sense of a trustee functioning in the administration phase of a case, and not to the present trustee.

When Congress revised the bankruptcy laws in 1978, it altered the treatment of unsecured federal tax claims arising before the filing of the bankruptcy petition ("prepetition" claims), giving most of them seventh priority (11 U.S.C. § 507(a)(7)); taxes arising after the filing of the bankruptcy petition and during the pendency of the bankruptcy case ("postpetition," or "administrative" taxes) were specifically given first priority (11 U.S.C. §§ 507(a)(1), 503(b)(1)(B)), albeit *pari passu* with other administrative claims. *See* 3 *Collier on Bankruptcy* ¶ 503.03, at 503-15 (L. King 15th ed. 1991). The exception to section 3713(a) for "a case under title 11" was also added then,[35] presumably to ensure the application of these congressional choices—including the determination that "administrative expenses include taxes which the trustee incurs in administering the debtor's estate, including taxes on capital gains from sales of property by the trustee and taxes on income earned by the estate during the case." S. Rep. No. 989, 95th Cong.,

[35] Bankruptcy Reform Act of 1978, Pub. L. 95-598, § 322, 92 Stat. 2549, 2678-79 (1978).

2d Sess. 66, *reprinted in* 1978 U.S. Code, Cong. & Admin. News 5787, 5852.

Two years later, Congress added the exact same language ("trustee in a case under title 11") to section 6012(b)(3) as a "conforming amendment."[36] Section 6012(b)(3)—along with the priority set out in the Bankruptcy Code—therefore closes the circle by providing that a "trustee in a case under title 11" is required to file returns and pay taxes incurred during the administration of the estate. A first-level priority was preserved for such taxes by Bankruptcy Code sections 503 and 507.

All agree that if this trustee had sold the Miami Center during the administration of the case, he would have been liable under section 6012(b)(3), as a "trustee in a case under title 11," to file the returns and pay the taxes. All also agree that if that had occurred, the taxes would have been entitled to first priority, albeit with other administration claims. Here, however, the bankruptcy court appointed the trustee to serve only after the administration of the case ended, and the trustee did not engage in taxable activity until after the administration phase was over.[37] Therefore, respondents contend, the trustee is not covered by the words "trustee in a case under title 11"; for the sake of argument, let us accept that contention. But they further contend the taxes are not entitled to any priority at all; that is unsupportable. The two statutes (which were modified to contain the same language as part of Congress' comprehensive revision of the Bankruptcy laws) must be read together. Either the trustee is a trustee "in a case under title 11," or he is not. If so, he is concededly covered by the narrow term in I.R.C. § 6012(b)(3) (as well as by the broader terms in that subsection and in subsection 6012

[36] Bankruptcy Tax Act of 1980, Pub. L. 96-589, § 6(i)(5), 94 Stat. 3389, 3410.

[37] Confirmation of a reorganization plan terminates the administration phase of the case and, in most circumstances, discharges the debtor. 11 U.S.C. § 1141.

(b)(4), and in section 960) and is required to file the returns and pay the taxes as a first priority administrative expense.

If, on the other hand, respondents are correct that the trustee is not a "trustee in a case under title 11," the trustee falls outside the exception contained in 31 U.S.C. § 3713(a), and (1) the Government's absolute priority supersedes the claim of any other creditor under the plain language of the statute and two centuries of undisturbed precedent enforcing it; and (2) the trustee is subject to absolute, statutory, personal liability for making distributions that contravene that priority.[38] To hold that the circle is broken—and that a trustee appointed by a United States court to succeed to an insolvent estate and serve pursuant to a bankruptcy reorganization plan can elude the tax collector entirely, let alone the collector's priorities—is an aberrant and illogical result.

The present case, we submit, should best be held not to be within the exception for "a case under title 11" in the substantive subsection of the absolute priority statute, section 3713(a). Section 3713 is the more general statute, having been on the books for two centuries, having had a history of broad construction, and having been held, absent express exception, to persist despite the presence of a federal bankruptcy act. The exception from the substantive priority provision of section 3713(a) is obviously designed to comport with the priority section of the Bank-

[38] Of course, this is not to say that the trustee is *exonerated* from personal liability if he is held to be a "trustee in a case under title 11." He still faces liability under section 960 and under general trust principles for his breach of fiduciary duties. *See Boteler* v. *Ingels*, 308 U.S. at 60 n.6 (leaving open the question whether section 960 requires personal liability for failure to pay taxes); *Restatement (Second) of Trusts* §§ 201 & comment b; 202 & comments j & n & illus. 28; 205 (1959) (setting forth general principles of trustee's personal liability for wrongful disbursal and commingling of trust funds); *cf. United States* v. *Crocker*, 313 F.2d 946, 949 & n.14 (9th Cir. 1963) ("A fiduciary is not relieved of liability [under section 3713] because distribution in disregard of the government's priority has been approved by the court.").

ruptcy Code, 11 U.S.C. § 507. But claims subject to the priorities defined in section 507 of the Bankruptcy Code are restricted to those either (a) arising during the administration of the case (and hence, generally entitled to first priority) or (b) in existence at the time of the commencement of the case. *See* Pet. App. 9a; 911 F.2d at 1544; *United States* v. *Redmond*, 36 Bankr. 932, 934 (D. Kan. 1984). Section 507 does not address the priority of claims arising out of events subsequent to the confirmation of a plan of reorganization and subsequent to the administration of the case. *Id.* The tax claims here are post-confirmation taxes not dealt with in section 507. Obviously, their priorities were left for determination by the provisions of section 3713(a).

It would follow from this that for purposes of the personal liability subsection of this statute, section 3713(b), this trustee should not be held to be "a trustee acting under title 11," language which is clearly used in subsection (b) in the same sense as the similar language in subsection (a). This reading of the phrase "trustee in a case under title 11" would promote the federal policy of ensuring the collection of federal taxes—by assuring that a fiduciary appointed as part of a reorganization plan and acting in the post-confirmation time frame who fails to pay federal taxes faces absolute, statutory, personal liability for his infidelity to the United States. As noted, such a reading of the phrase "trustee in a case under title 11" would not blunt the applicability of the remainder of section 6012(b)—nor of section 960.

In sum, Congress has enacted a comprehensive system of interlacing statutes requiring trustees, assignees, receivers, and other fiduciaries for insolvents to file returns for and pay the taxes of their charges. The statutes may well be "redundant." *See* 1 *Collier on Bankruptcy* ¶ 8.02, at 8-15. That is because Congress acted both early and late, repeatedly, and out of an excess of caution.

2. *The Consequences of a Judge-Made Exception for Liquidating Trustees.*—The court of appeals' decision

contravenes and undermines this system and gives bankruptcy creditors the opportunity to set up a creature, the "liquidating trustee," with a license to engage in taxable activities without the filing of returns and payment of taxes—a new form of extra-legislative tax-exemption. By immunizing the liquidating trust and its proceeds from obligations to pay federal income tax—whether on capital gains or on ordinary income, such as interest income on Treasury securities and other money market investments in the trust—this creditor-drafted plan permitted the creditors of the insolvent debtors to obtain numerous windfalls without competition from the Government's claim for federal income taxes. Although the Bank's mortgage claim on the Miami Center property was found to be "undersecured" and thus ordinarily not entitled to interest accruing after the commencement of the case ("postpetition interest"), *see* p. 3 & n.4, *supra*, the Plan of Reorganization provided that such postpetition interest (in excess of $27 million) was to be paid in full and indeed that interest was to be paid at a rate higher than that provided for in the governing instruments. *See In re Holywell Corp. (Holywell Corp.* v. *Bank of New York)*, 901 F.2d 931, 933 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 713 (1991). An estate swollen by the retention of moneys otherwise due the Federal Government for taxes yields itself readily to such payments to the creditors in lieu of those due to the public Treasury.

The holding below raises the possibility—indeed the probability—that "liquidating trustees" will become the norm in cases where a matter begun as a corporate or business reorganization under the Bankruptcy Code turns into one in which a substantial or total liquidation of the business' property takes place.[39] Instead of converting

[39] No official statistics are kept or compiled concerning the use of liquidation plans in chapter 11 cases. However, in October 1989 the Administrative Office of the United States Courts reported that it had retained the accounting firm of Ernst & Young to conduct a study of chapter 11 cases. Although Ernst & Young did not specifically study the frequency or extent of the use of liquidating

such cases to a chapter 7 liquidation or leaving the debtor as a debtor-in-possession to liquidate the business under court supervision, a standard form "Plan of Reorganization," similar to the one here, can be adopted conveying all the debtor's assets to a "liquidating trustee," who is charged with liquidating the debtor's property but is exempt from the various federal statutes requiring the payment of federal income taxes. Indeed, the use of a "liquidating trust" in chapter 11 cases is already of increasing popularity.[40] It will only become more so once it is viewed by creditors as a means of avoiding tax obligations.

The suggestion of the majority of the court of appeals that the "reorganized debtor," not the trustee, is liable for the federal income taxes incident to the trustee's operations not only rewrites the statutes but elects the source least likely to have funds to pay the federal income taxes to be the party responsible for paying them. It facilitates the use of the liquidating trust as a tax-avoidance device. It may be anticipated that in the usual case of a liquidating plan the debtor will be stripped of all or substantially all of its property, and the same placed in the "liquidating trust," as was the case here.

plans, it estimated that approximately 20 to 30 percent of the chapter 11 cases reviewed were liquidations. E. Flynn, Bankr. Div., Admin. Off. of U.S. Courts, *Statistical Analysis of Chapter 11* at 12 (October 1989). In fiscal 1989, more than 17,000 chapter 11 cases were filed. Annual Report of the Director of the Administrative Office of United States Courts 362 (1989). This would suggest that 3,500 to 5,000 cases begun in chapter 11 each year turn into liquidations.

[40] For several recent cases utilizing a "liquidating trust" in a chapter 11 reorganization, see, *e.g.*, *Toren* v. *Braniff, Inc.*, 893 F.2d 763, 765 (5th Cir. 1990); *In re Highway Equip. Co. (Highway Equip. Co.* v. *Alexander Howden Ltd.)*, 120 Bankr. 910, 911 (Bankr. S.D. Ohio 1990); *In re Crowthers McCall Pattern, Inc.*, 120 Bankr. 279, 283 (Bankr. S.D.N.Y. 1990); *In re Mako, Inc.*, 120 Bankr. 198, 200 (Bankr. E.D. Okla. 1990); *In re Mortgage Inv. Co.*, 111 Bankr. 604, 609 (Bankr. W.D. Tex. 1990). (We do not mean to suggest that in those cases the fiduciaries did not file tax returns; the point is that under the court of appeals' holding such fiduciaries may take the position that they need not do so.).

Where corporations are involved, this leaves essentially a corporate shell holding the obligation to pay the taxes; and thus, the Treasury is left holding the bag. Where, however, as with one of the debtors here, a debtor is an individual, such a debtor could not possibly enjoy "a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934). The court of appeals' decision to this extent would undermine the "fresh start" that is "a central purpose of the [Bankruptcy] Code." *Grogan* v. *Garner*, 111 S. Ct. 654, 659 (1991). One pair of commentators (after studying this question) observed that "[n]o useful purpose is served by shifting to the bankrupt the tax upon the unrealized appreciation in his assets, which appreciation is realized upon liquidation in bankruptcy. Such tax treatment simply would frustrate the theory of rehabilitation of giving a debtor a fresh start . . . ." Krause & Kapiloff, *The Bankrupt Estate, Taxable Income and the Trustee in Bankruptcy*, 34 Fordham L. Rev. 401, 417 (1966); *cf. In re Bentley*, 916 F.2d 431, 432-33 (8th Cir. 1990).[41]

This Court should not countenance the continued possibility of any such scheme. The Court should determine that the absolute priority statute, section 3713 of title 31, applies to this case, as well as to every other case of the devolution of an insolvent person's estate upon a fiduciary

[41] Congress has determined that it is the *estate*, not the emerging debtor, which is responsible (with a lone, clearly demarcated, and irrelevant exception) for the payment of taxes incurred in the administration of the bankruptcy proceedings. *See* 11 U.S.C. § 346(b)(1) (income of individual may be taxed by state and local authorities only to the estate); 11 U.S.C. § 346(f) (trustee must pay state and local withholding taxes); 11 U.S.C. §§ 1129(a)(7), 726(a)(1), 507(a)(1), 503(b)(1)(B)(i) (together, prohibiting a plan of reorganization from being approved if it would provide for payment of any unsecured claims before any tax "incurred by the estate" (§ 503(b)(1)(B)(i)). The exception is 11 U.S.C. § 346(d) (state and local income tax on individual in Chapter 13 may be imposed only on debtor, not estate).

as a result of the bankruptcy process or the other processes specified in the section; should hold that section 960 of the Judicial Code is applicable; and should hold that the sweeping language referring to all sorts of "assignees" and "fiduciaries" in sections 6012(b)(3) and (4) of the Internal Revenue Code also governs.

II. THE COURT OF APPEALS' "MOOTNESS DOCTRINE" DOES NOT PRECLUDE REVIEW OF THE TRUSTEE'S LIABILITY, OR HIS PURSUIT OF CLAIMS AGAINST THE BANK.

In addition to its unprecedented and unsupported interpretation of section 6012(b), the court of appeals also held that the so-called "mootness doctrine" in bankruptcy cases prohibited it from considering two of the trustee's three allegations in his complaint concerning the Bank's vicarious liability for the payment of the taxes: (1) the Bank is liable for the taxes because it committed a fraud on the court by failing to disclose its intentions concerning taxes, and (2) it is liable because it proposed a plan without providing the means to pay the taxes.[42] But the court rejected respondents' argument that the issue of the *trustee's* liability to pay the taxes could not be considered under its "mootness doctrine." Raising that issue was not an "attempt to modify or alter the Plan" and was addressed on the merits by the court of appeals. Pet. App. 6a; 911 F.2d at 1544.

We address the "mootness doctrine" here for two reasons. First, respondents' reliance on that doctrine (which was framed as an attack on this Court's jurisdiction)[43] in opposing certiorari (and presumably to be

[42] The trustee also alleged that the Bank provided him a personal indemnification; the court of appeals did not speak to this allegation.

[43] No argument is made that this case fits within the traditional mootness framework: the controversy between the parties had not been settled or otherwise "mooted" in the usual sense, so as to make further adjudication offend the Article III requirement that the

renewed) fundamentally misconstrues the obligations of the federal courts in implementing the bankruptcy laws and should be rejected. Second, the court of appeals' application of its "mootness doctrine" to preclude the trustee's pursuit of his allegation of fraud is so clearly erroneous that if the Court addresses respondents' reliance on the "mootness doctrine" it will conclude that this aspect of the decision below also must fall.

Respondents claimed in opposing certiorari that the Bank, because of the bankruptcy "mootness doctrine," had succeeded in causing the appointment of a trustee with a permanent exemption from the federal statutes. Why is this? Because, they say, the United States did not perceive that it was the Bank's (undisclosed) intention that the trustee should be exempt from the payment of federal income taxes (and the United States, accordingly, did not object to the Plan), and because the debtors did not happen to have $50 million available to obtain a stay of the consummation of the Bank's "cram-down" Plan. The trustee is thus immunized from his statutory obligation to pay federal taxes, they say, and the Bank is immunized from any challenge by anyone for its actions in connection with the confirmation of this Plan.

This contention should be rejected for at least three reasons. First, it affords bankruptcy creditors and debtors the opportunity to evade all kinds of continuing obligations imposed by law and turns the statutory scheme at issue here on its head. Second, the supposed authority

federal courts decide only "Cases" and "Controversies." *See DeFunis* v. *Odegaard*, 416 U.S. 312, 319-20 (1974); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). The "usual rule in federal cases . . . that an actual controversy must exist at stages of appellate or certiorari review," *Roe* v. *Wade*, 410 U.S. 113, 125 (1973), is fully met here, and no one could argue otherwise.

Nor is there any argument that Congress, by statute, has expressly precluded the district courts or the courts of appeals from exercising jurisdiction or providing relief in this case. *Cf. Lockerty* v. *Phillips*, 319 U.S. 182, 187-89 (1943); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512-14 (1869).

for this "doctrine" comes not from the Constitution or Congress, but solely from "considerations of finality" that amount to a refusal to decide a case based on nothing more than judicial fiat. Third, while the court of appeals expressly held that its "mootness doctrine" (broad as it is) did not cover the question presented in our Petition, should respondents argue that the Eleventh Circuit's "mootness doctrine" is broad enough to apply to that question, we would urge that the "mootness doctrine" so applied would raise questions of constitutional dimension.

1. *The "Mootness Doctrine" is Inapplicable to the Trustee's Statutory Obligations.*[44]—Acceptance of respondents' remarkable contentions would afford great possibilities in the structuring of plans of reorganization for troubled enterprises. The potentials in the tax area are made obvious by this case. But there is no reason to believe creative bankruptcy lawyers will stop there. Many federal statutory obligations are financially burdensome—but creditors and debtors are not permitted to immunize themselves from these statutes by adopting a plan of reorganization that precludes compliance. Otherwise, companies will begin to adopt plans calling for the non-applicability of costly federal statutes like OSHA, CERCLA, the Clean Air Act, and the Food and Drug Act. There is no distinction between an ongoing duty to comply with these statutes and an ongoing duty to comply with the federal tax laws.

Moreover, respondents' position turns the particular statutory scheme involved here on its head. As the Court explained in *Bull* v. *United States*, 295 U.S. 247, 259-60

[44] We shall assume, except where otherwise noted, for the purposes of argument, the correctness of the point made by the Bank and apparently by the trustee, in opposing certiorari, that the Plan's failure to provide for the payment of taxes should have been equated with an express provision that the trustee was not liable for the payment of taxes. Of course, we dispute the equivalency of the two concepts.

(1935), because "taxes are the life-blood of the government and their prompt and certain availability an imperious need . . . . the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer." This policy has found expression in section 960 of the Judicial Code, which makes it clear that, as an officer of the court, the trustee must pay taxes on his own initiative. Section 960 prescribes a standard of conduct for the fiduciary, not for the taxing authorities. Similarly I.R.C. § 6012 (b)(3) places the burden on the trustee to file returns, thereby providing the United States with sufficient information to understand the tax liabilities, and requires the trustee to pay the taxes in the ordinary course—in conformity with the federal income tax self-assessment system. A similar obligation is imposed on trustees not appointed by courts. I.R.C. § 6012(b)(4). And 31 U.S.C. § 3713 imposes a similar, absolute obligation on insolvency "representative[s]," under pain of personal liability. These laws simply do not permit the trustee to ignore his legal obligations to the United States—obligations that do not depend in any way on action or inaction by the taxing authorities or the direction in a Plan that he pay—or not pay—taxes.

2. *The Expansion of the "Mootness Doctrine" Suggested by Respondents is Without Statutory Authority.*—Congress has determined that "[t]he courts of appeals shall have jurisdiction of appeals from *all* final decisions, judgments, orders, and decrees" entered in bankruptcy cases. 28 U.S.C. § 158(d) (emphasis added). Section 158 also uses mandatory language in describing the appellate jurisdiction of the district courts and of bankruptcy appellate panels over orders of the bankruptcy courts. 28 U.S.C. § 158(a)-(b).

Thus Congress has established a system that requires: (1) exclusive district court jurisdiction of bankruptcy cases, which are ordinarily referred to the bankruptcy

court;[45] (2) appellate review in the first instance either by a district judge or a bankruptcy appellate panel; and (3) appellate review of *all* cases in the courts of appeals. The mandatory language of the statute ("shall have jurisdiction" over "all" appeals) indicates a clear intent that judicial review should not be precluded except in the most limited circumstances—circumstances that Congress has defined by statute.

There are only two provisions in the Bankruptcy Code precluding appellate review in the absence of a stay: section 363(m) and section 364(e).[46] Under section 363(m), the "validity" of a sale cannot be "affect[ed]" by reversal on appeal if made under authority of section 363(b) by a trustee (or the debtor-in-possession) after notice and a hearing on the proposed sale during the course of the bankruptcy case. The Bank and the court of appeals have both acknowledged that "[s]section 363(m) does not apply . . . [to sales] by a liquidating trustee pursuant to a plan of liquidation." *Miami Center*, 838 F.2d at 1553. In this absence of congressional direction to the contrary, judicial review should not be precluded based on generalized policy considerations of finality.[47]

Absent exceptional circumstances, "the federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983) (quoting

[45] 28 U.S.C. §§ 157(a), 1334.

[46] Section 364(e)—which relates to authorizations under section 364 to obtain credit or incur debt—is clearly inapplicable to this case even by any form of analogy.

[47] Although some judges and courts have expressed the view that precluding review in cases where sections 363(m) and 364(e) do not apply will enhance the value of bankruptcy estates being liquidated (*see, e.g., In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1095 (3d Cir. 1990) (Sloviter, J., dissenting); *In re Stadium Mgt. Corp.*, 895 F.2d 845, 847 (1st Cir. 1990)), Congress made its view clear that only a limited class of bankruptcy transactions was to be insulated from appellate review. That policy decision must be left with Congress.

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)); *see England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964); *McClellan v. Carland*, 217 U.S. 268, 282 (1910); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). As Justice Brennan explained in *Colorado River*, "[o]nly the clearest of justifications" warrant a federal court's decision to decline to exercise the jurisdiction provided by Congress. 424 U.S. at 819. Such justifications include, for example, a clear expression of congressional intent that jurisdiction should not be exercised—as in *Colorado River* itself, as well as cases controlled by the language of statutes that preclude judicial review. *E.g., Lockerty v. Phillips*, 319 U.S. at 187-89; *Ex parte McCardle*, 74 U.S. (7 Wall.) at 512-14. Here, however, Congress has expressed its intent that the courts shall exercise jurisdiction over "all" bankruptcy cases, 28 U.S.C. §§ 158(d), 1334, and carved out only two limited exceptions. *See In re Joshua Slocum Ltd.*, 922 F.2d at 1084 ("only two provisions of the Bankruptcy Code . . . specifically require that a party seek a stay pending appeal . . . . We decline to . . . create a third situation where parties are required to seek a stay"); *cf. In re AOV Indus.*, 792 F.2d 1140, 1148 (D.C. Cir. 1986) (application of "mootness doctrine" to reorganization plan inappropriate unless the plan "'has been so far implemented that *it is impossible to fashion effective relief for all concerned*'") (quoting *In re Roberts Farms, Inc.*, 652 F.2d 793, 797 (9th Cir. 1981)) (emphasis by the *AOV* court); *Ohio v. Madeline Marie Nursing Homes*, 694 F.2d 449, 463 (6th Cir. 1982) (recognizing inapplicability of "mootness doctrine" where disgorgement or other equitable relief available). Respondents' request that the Court expand the "mootness doctrine" beyond the statutory limits—and beyond the limits placed on it by the court of appeals—would defy congressional intent.

3. *The Eleventh Circuit's Version of the "Mootness Doctrine" Has Led to Erroneous Results and, If Taken to*

the Further Extremes Respondents Suggest, Would Be Unconstitutional.—While the Eleventh Circuit did not go so far as to apply its mootness doctrine to the question whether the trustee was required to file tax returns and pay taxes, if the Court were to find this ruling inconsistent with the Eleventh Circuit's other rulings applying the mootness doctrine in this case, the Eleventh Circuit's enunciation of the "mootness doctrine" should not be accepted as an appropriate standard. The court of appeals' doctrine exemplifies a disturbing misapplication of the bankruptcy laws and violates the constitutional requirement that the essential attributes of judicial power be retained in an Article III court.

The court of appeals declined to consider the trustee's argument that the Bank should be liable because it proposed a plan that did not provide for the payment of taxes. That *issue* was therefore held unreviewable. But a bankruptcy judge may not confirm a plan without adequate investigation into whether federal taxes will be paid. *United States* v. *Energy Resources Co.*, 110 S. Ct. 2139, 2142 (1990) ("The Code . . . requires the bankruptcy court to assure itself that reorganization will succeed, [11 U.S.C.] § 1129(a)(11), and therefore that the IRS, in all likelihood, will collect the tax debt owed."); *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U.S. 414, 434-35 (1968) (bankruptcy court must engage in "adequate and intelligent consideration of the merits," not "mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law"; "a plan of reorganization which is unfair to some persons may not be approved by the court even though the vast majority of creditors have approved it"). Here, the bankruptcy judge considered himself "a babe in the woods" without "the foggiest notion" of the tax consequences of the Bank's Plan. *See* pp. 4-5, *supra*. He never received evidence or argument upon the nature and extent of the tax liabilities.[48] If the Bank is correct that its Plan was intended to preclude the trustee from paying the taxes, the Plan should never have been confirmed. *See United States* v. *Key*, 397 U.S. at 326 (under former Chapter X of the Bankruptcy Act, a liquidating plan which ignored the absolute priority of the United States under the predecessor of section 3713 was not "fair and equitable" and could not be confirmed).[49] The trustee correctly says that the Bank should now be held responsible for the "material omission" (J.A. 127) on which the Court and the creditors relied. Doing so will not require creditors who have long since been paid to be hauled back into court. Relief against the trustee by the taxing authorities and by these authorities and the trustee against the Bank will be sufficient. *See In re AOV Indus.*, 792 F.2d at 1149 ("mootness doctrine" unavailable where defendant can "make partial or total restitution . . . to the Debtor's estate"). So far from it being the law that considerations of "mootness" preclude a fiduciary appointed under a plan from protesting that the plan is unlawful if it contravenes the United States' absolute priority, this Court has held that such a fiduciary is expected, even after plan confirmation, to call such a deficiency to the attention of the court. *See King* v. *United States*, 379 U.S. at 339.

Similarly, the court of appeals held that the trustee was not permitted to pursue his allegation that the Bank's Plan was the product of a fraud on the court.

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[48] Indeed, the bankruptcy judge suggested only that some kind of "adjustment" might be made to "alleviate adverse tax consequences." Transcript on Motion for Substantive Consolidation (July 18, 1985) (BNY Br. in Opp. B-49). The Judge did not appear to understand that a sale of a property creates capital gains: a "tax consequence" that simply cannot be "alleviate[d]."

[49] Here, of course, the Plan has been held to violate the fair and equitable standard. *See* pp. 4 n.5, 6-7, *supra*.

But the bankruptcy court has the power to investigate such allegations and to fashion appropriate relief accordingly. All federal courts possess an inherent power that, *inter alia*,

> allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court. This "historic power of equity to set aside fraudulently begotten judgments," *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 245 (1944), is necessary to the integrity of the courts, for "tampering with the administration of justice in [this] manner . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public." *Id.* at 246.

Chambers v. *NASCO, Inc.*, 111 S. Ct. 2123, 2132 (1991) (citations omitted). While Congress has determined that a court may not "revoke" an order of confirmation for fraud after 180 days have elapsed, 11 U.S.C. § 1144, the inherent power provides substantial alternatives to revocation, including the relief requested by the trustee here—liability of the Bank as the proponent of the Plan.

More fundamentally, the application of the "mootness doctrine" suggested by respondents raises troubling constitutional questions. In essence, respondents seek a judicially created doctrine that effectively precludes Article III scrutiny of bankruptcy judges' decisions. Once a creditor's "cram-down" plan is confirmed, unless the debtors post a bond—and bankruptcy debtors as a class are unlikely to have the wherewithal to do so—the entire case will become "moot" and Article III review improper. If Congress had done explicitly what respondents suggest the courts do, such a statute would have been unconstitutional because the "essential attributes of the judicial power" would not be retained in an Article III court. *See Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 77 (1982) (plurality opinion). Under respondents' theory, bankruptcy judges would confirm

plans without the possibility of any Article III review at all.

III. THE GRANTOR TRUST RULES ARE INAPPLICABLE IN BANKRUPTCY CASES.

In opposing certiorari, respondents asserted that the grantor trust provisions of the Internal Revenue Code, I.R.C. §§ 671 to 679, somehow relieve the trustee of his responsibilities to file federal tax returns and pay federal taxes and instead require the debtors to pay the taxes out of assets not held by the trustee. (Of course, since the trustee asserts that he has possession of *all* the debtors' assets under 11 U.S.C. § 541(a), there are no such assets.) The court of appeals declined to accept respondents' invitation to meld these two distinct statutory schemes in such a novel and self-defeating way; this Court may similarly reject it because the grantor trust provisions simply do not apply in bankruptcy cases.

The grantor trust provisions govern the tax liabilities of grantors of trusts who maintain specified types of dominion and control over the trust's assets. In general, they were enacted to provide express and specific rules for "taxing to the grantor the income of a trust over which he has retained substantial dominion and control," in response to this Court's decision in *Helvering* v. *Clifford*, 309 U.S. 331 (1940). S. Rep. No. 1622, 83d Cong., 2d Sess. 364, *reprinted in* 1954 U.S. Code Cong. & Admin. News 4621, 5005.

Where the grantor's powers come within one of the specific provisions of the grantor trust rules (I.R.C. §§ 673 to 679), the statute provides "there shall then be included in computing the taxable income and credits of the grantor . . . those items of income, deductions, and credits against tax of the trust." I.R.C. § 671. In other words, where the grantor trust rules apply, they require the inclusion of the *trust's* income in the income of the *grantor*.

These provisions were never intended to apply in bankruptcy cases. To apply them here as respondents have

suggested would exempt the trustee from the obligation to pay the taxes when he is the one and only person with the assets to do so. This would be directly contrary to the spirit and purpose of the grantor trust provisions, which were enacted to prevent the maker of a voluntary, donative transfer from escaping taxation on the trust income while retaining dominion and control of the trust. The House Report accompanying the original grantor trust statute[50] explained: "Trusts have been used to evade taxes by means of provisions allowing the distribution of the income to the grantor or its use for his benefit. The purpose of this subdivision of the bill is to stop this evasion." H.R. Rep. No. 179, 68th Cong., 1st Sess. 59, *reprinted in* 1939-1 C. B., Pt. 2, 241, 256. Congress' solution was to require such grantors to include the trusts' income as their own. There is no evidence that Congress ever intended that these rules could actually be used by participants in the bankruptcy process to *escape* the effects of taxation.

The only court of appeals to have addressed the applicability of the grantor trust rules to trusts created in bankruptcy cases has held them unequivocally inapplicable because " 'the very nature of the Bankruptcy Act is inconsistent with the requirements of the Grantor Trust provisions.' " *DePinto* v. *United States*, 585 F.2d 405, 407 (9th Cir. 1978) (citation omitted). In that case, the court examined the legislative history of these provisions and explained:

> One who obtains the protection of the Bankruptcy Act does not make a donative transfer and usually with great regret relinquishes the sort of dominion and control over the bankruptcy estate that Congress perceived to be an essential element of the grantor trust provisions. Nothing in the legislative history of these provisions indicates that Congress intended for

[50] Revenue Act of 1924, Pub. L. 68-196, § 219(g), 43 Stat. 253, 277.

> them to apply in the case of an individual bankruptcy. We so hold.

585 F.2d at 407 (citations omitted).

As the *DePinto* court recognized, bankruptcy cases simply do not fit within the grantor trust provisions. Indeed, respondents relied for their argument on a single, wrongly decided bankruptcy case, *In re Sonner*, 53 Bankr. 859 (Bankr. E.D. Va. 1985), which Professor King and his colleagues consider "one of the more troubling cases" because it "reaches a harsh result using a strained application of the grantor trust provisions." 1 *Collier on Bankruptcy* ¶ 8.02, at 8-16. Moreover, this trust, created pursuant to a confirmed plan of reorganization, was not the subject of a voluntary, donative transfer of any sort—it was a trust imposed on the debtors by a court over their vehement objection.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS INVOLVED

1. Section 960 of Title 28, United States Code, Judiciary and Judicial Procedure, provides:

> **28 U.S.C. § 960. Tax liability**
>
> Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

2. Section 6012(b) of the Internal Revenue Code of 1954, as amended, provides in part: [1]

> **26 U.S.C. § 6012. Persons required to make returns of income**
>
> * * * *
>
> **(b) Returns made by fiduciaries and receivers.—**
>
> * * * *
>
> **(3) Receivers, trustees and assignees for corporations.**—In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

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[1] The present provision of the Internal Revenue Code of 1986, 26 U.S.C. § 6012(b) (1988), is identical.

(4) Returns of estates and trusts.—Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

* * * *

3. Section 6151(a) of the Internal Revenue Code of 1954, as amended, provides:[2]

26 U.S.C. § 6151. Time and place for paying tax shown on returns

(a) General Rule.—Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment, or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

4. Section 3713 of Title 31, United States Code, Money and Finance, provides in part:

31 U.S.C. § 3713. Priority of Government claims

(a)(1) A claim of the United States Government shall be paid first when—

(A) a person indebted to the Government is insolvent and—

(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached; or

[2] The present provision of the Internal Revenue Code of 1986, 26 U.S.C. § 6151(a) (1988), is identical.

(iii) an act of bankruptcy is committed;

* * * *

(2) This subsection does not apply to a case under title 11.

(b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

(8) (9)

Nos. 90-1361 and 90-1484

In the Supreme Court of the United States

OCTOBER TERM, 1991

HOLYWELL CORPORATION, ET AL., PETITIONERS

v.

FRED STANTON SMITH, ETC., ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

FRED STANTON SMITH, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the trustee of a liquidating trust, appointed by a bankruptcy court to receive and dispose of the debtors' assets pursuant to a Chapter 11 plan of reorganization, is required to file federal income tax returns on behalf of the debtors and pay the taxes due.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 911 F.2d 1539.[1] The opinion of the district court (Pet. App. 17a-27a) is unreported. The opinion of the bankruptcy court (Pet. App. 28a-37a) is reported at 85 Bankr. 898.

[1] References to "Pet. App." in this brief are to the Appendix to the petition (No. 90-1361) filed by the debtors in the under-

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1990. A petition for rehearing was denied on December 21, 1990 (Pet. App. 40a-41a). The petition for a writ of certiorari in No. 90-1361 was filed on February 28, 1991. The petition for a writ of certiorari in No. 90-1484 was filed on March 21, 1991. The petitions were granted on May 28, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 6012(b) of the Internal Revenue Code, as amended, provides in pertinent part:

A. Section 6012(b)(3):

> [illegible] case where a receiver, trustee in a case [illegible] title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

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lying bankruptcy proceeding. The petition filed by the debtors has been consolidated for briefing and argument with the petition filed by the United States (No. 90-1484). The parties to the proceedings in the court of appeals, in addition to the United States, were Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates, Theodore B. Gould (collectively, the debtors), Fred Stanton Smith (the trustee) and the Bank of New York (the bank).

B. Section 6012(b)(4):

> Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

2. Section 6151(a) of the Internal Revenue Code, as amended, provides:

> Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

STATEMENT

1. Miami Center Limited Partnership obtained a construction loan from the Bank of New York (the bank) for development of the Miami Center, a commercial real estate project in downtown Miami. Following default on this loan, the Miami Center Limited Partnership and the related Holywell Corporation, Chopin Associates, Miami Center Corporation, and Theodore B. Gould (the debtors) filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Florida. The cases were consolidated. Pet. App. 2a. On October 22, 1984, the bankruptcy court authorized the consummation of a pre-petition contract to sell parcels of real property in Washington, D.C. (the Washington properties), owned by Holywell Corporation. These

sales were concluded in December 1984 and January 1985, generating proceeds of approximately $32 million. Pet. App. 29a; *Holywell Corp.* v. *Bank of New York*, 59 Bankr. 340, 345 (S.D. Fla. 1986).

2. The debtors and the bank thereafter submitted competing plans of reorganization to the bankruptcy court. On August 8, 1985, the bankruptcy court confirmed an amended version of the bank's plan, over the debtors' objections. The district court affirmed the confirmation order. See *Holywell Corp.* v. *Bank of New York*, 59 Bankr. at 353. The Eleventh Circuit subsequently dismissed, as moot, the debtors' appeal of the confirmation order because the plan had been substantially consummated and no effective relief could be fashioned. See *Miami Center Ltd. Partnership* v. *Bank of New York*, 838 F.2d 1547, 1557, cert. denied, 488 U.S. 823 (1988).[2] Pet. App. 2a-3a.

The plan, which was effective October 10, 1985, called for transfer of essentially all of the debtors' assets (including the Miami Center and the proceeds from the sale of the Washington properties) to a liquidating trust.[3] See Pet. App. 42a-43a.

> Article V of the Plan vests the liquidating trustee with all right, title, and interest of the debtors in their estate property and empowers the trustee to administer the liquidation of that property pursuant to the Plan. The Plan authorizes the liquidating trustee not only to liquidate the debtors' property but also to manage the property "in all other ways as would be lawful for any person owning the same to deal therewith. . . ."

Pet. App. 14a. See *id.* at 43a-46a.

[2] The government filed no objection to the confirmation of the plan and did not participate in the appeals of the confirmation order. Pet. App. 18a-19a.

[3] Article V of the plan provides that "[a] Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court * * * is designated as Trustee of all property of the estates of the Debtors." Pet. App. 43a.

Under the plan, the trustee of the liquidating trust was directed to enter into a contract with the bank for sale of the Miami Center. A sale price of $255.6 million was established, consisting of approximately $16 million in cash and the cancellation of $240 million of debt owed by the debtors to the bank. The net proceeds of the sale were to be paid into the liquidation trust, along with the proceeds from the sale of the Washington properties, for eventual distribution to creditors. Pet. App. 3a & n.2, 19a.

3. Although the gain on the sale of the Washington properties was realized during the fiscal year ending July 31, 1985, no tax returns reporting the pre-confirmation sale income were filed until January 4, 1988. At that time, Holywell Corporation filed a consolidated tax return for fiscal year 1985 and requested the trustee (who then held the sale proceeds, along with the debtors' other assets) to pay the taxes owed. Pet. App. 3a & n.3, 19a.

Neither the corporate debtors nor the trustee filed federal income tax returns for any fiscal year ending after July 31, 1985. As a result, they never reported the gains realized from the sale of the Miami Center property. Nor did the debtors or the trustee report the interest income derived by the trustee from reinvestment of the sales proceeds. Pet. App. 3a-4a. The taxes owed on the realized gains (in excess of $75 million) from the sales of property, and the interest

income (in excess of $8 million) earned on the proceeds of those sales, were thus neither reported nor paid by the debtors or the trustee. See 90-1361 Pet. 6 n.5.

4. Instead, on December 27, 1987, the trustee of the liquidating trust filed an adversary proceeding in the bankruptcy court seeking a declaration that the trustee was not obliged to file federal income tax returns or pay income tax on the gains realized from the sales of the Washington and Miami Center properties or the interest income received on the proceeds of those sales.[4] Pet. App. 4a. The government contended that the trustee was required to file income tax returns on behalf of the debtors and to pay the tax due, pursuant to Sections 6012(b)(3) and (4) and 6151(a) of the Internal Revenue Code (26 U.S.C.). Under Section 6012(b)(3), "a receiver, trustee in a case under title 11 of the United States Code," or "[an] assignee," having possession of or title to substantially all of the property of a corporate debtor, is required to file tax returns on behalf of the debtor. With respect to individual debtors, Section 6012(b)(4) similarly provides that the returns of a "trust" or an "estate of an individual under chapter 7 or 11 of title 11 of the United States Code" shall be filed by the "fiduciary thereof." Section 6151(a) then further provides that the person required to file such a tax return shall "pay such tax."

[4] No determination of any party's tax liability had then been made by the IRS with respect to such gains and investment income. In the absence of a return, the IRS informs us that it has now tentatively computed Holywell's liability for tax, penalties and interest for the tax year ending July 31, 1986, to be in excess of $33 million.

The bankruptcy court held, however, that the trustee was not responsible for filing federal income tax returns on behalf of the debtors and therefore was not responsible for paying the federal income taxes due. The bankruptcy court ruled that the liquidating trustee was not a "trustee in a case under title 11" within the meaning of Section 6012(b)(3), but rather "a creature of a contract, * * * a contract trustee." Pet. App. 32a. The court further held that the trustee was neither an "assignee" under Section 6012(b)(3) nor a "fiduciary" under Section 6012 (b)(4), reasoning that the trustee's duties and powers were limited to disposition of the debtors' assets and were thus analogous to those of a "disbursing agent." Pet. App. 32a-33a. The court concluded that the debtors, not the trustee, were responsible for reporting and paying any taxes due on the realized gains and interest income, notwithstanding the fact that all assets from which payment could be made had been transferred from the debtors to the trust. Pet. App. 31a-34a. The district court adopted the bankruptcy court's reasoning and affirmed its ruling. Pet. App. 17a-27a.

5. With one judge dissenting, the Eleventh Circuit affirmed. The court of appeals held that "[b]y its terms" (Pet. App. 11a), Section 6012(b)(3)—which requires a "trustee in a case under title 11 of the United States Code" to file returns—"refers only to trustees who are appointed under Chapter 11 of the Bankruptcy Code." Pet. App. 11a. In the court's view, the liquidating trustee—who had been appointed by the bankruptcy court in this case—was not a trustee in a case under Title 11, "but rather a contract trustee performing limited and essentially ministerial duties." *Ibid.* The court further stated that

"the liquidating trustee's non-discretionary duties of distributing the trust property in accordance with the Plan makes him similar to a disbursing agent rather than an assignee or fiduciary." Pet. App. 11a-12a. The court suggested that its "conclusion does not leave the government without the ability to collect taxes on the post-confirmation sale of property. It simply means that the reorganized debtor, not the liquidating trustee is responsible for such taxes." Pet. App. 9a-10a.[5]

In dissent, Judge Cox noted that the majority had misread the plain words of the applicable statute. Judge Cox observed that Section 6012(b)(3) applies to all trustees "in a case under title 11 of the United States Code," not simply to trustees "appointed under Chapter 11" of that title. Pet. App. 13a (emphasis omitted). In his view, the majority's distinction between a "contract trustee" appointed by the bankruptcy court (Pet. App. 11a) and a "trustee in a case under title 11" (emphasis omitted) simply "fails to comport with the broad wording of the statute." Pet. App. 13a. The majority's interpretive gymnastics were, Judge Cox stated, inconsistent with the statute's legislative history, which reveals Congress's intent "to reach a broad spectrum of persons acting in a fiduciary capacity for a corporation in bankruptcy." Pet. App. 14a (citing H.R. Rep. No. 1337, 83d Cong., 2d Sess. A396 (1954), and S. Rep. No. 1622, 83d Cong., 2d Sess. 563 (1954)). Judge Cox concluded:

> [S]ection 6012(b)(3) anticipates any situation where substantially all the assets of a corporation are vested in a person acting in a fiduciary capacity for the bankrupt corporation. Accordingly, the liquidating trustee, not the assetless corporate debtors, should be responsible for discharging tax obligations.

Pet. App. 14a. He also concluded that the liquidating trustee is a "fiduciary" within the meaning of Section 6012(b)(4) and, therefore, responsible for filing returns and paying taxes for the estate of the individual debtor. Pet. App. 15a.

[5] The government also contended that the liquidating trustee is required to pay taxes under the plan of reorganization either as an administrative expense under Article I of the plan (and 11 U.S.C. 503(b)) or as a charge on the trust property pursuant to Article V of the plan. Article I provides for payment, as an administrative expense, of actual and necessary expenses incurred in preserving the bankrupt estate. Article V provides that "[a]ll costs, expenses and obligations incurred by the Trustee in administering the Trust or in any manner connected, incidental or related thereto, shall be a charge against the Trust Property." Pet. App. 9a. The court of appeals concluded that there was no duty to pay taxes directly under the plan (*ibid.*). Obviously, however, if, as we contend, the trustee is legally required to report and pay taxes on the income he receives in administering the debtors' property under Sections 6012(b) and 6151(a) of the Internal Revenue Code, such payments would represent an expense incurred in preserving the estate under Article I and an "expense[] and obligation[] incurred by the Trustee" in administering the property under Article V of the plan.

SUMMARY OF ARGUMENT

I. Congress has long manifested its intent that income accruing to a corporate debtor in bankruptcy is not to escape taxation. Section 6012(b)(3) requires a "receiver, trustee in a case under title 11 of the United States Code, or assignee," who obtains possession of or holds title to "all or substantially all the property * * * of a corporation" to file the income tax return for that corporation. The statute emphasizes the breadth of its command by stressing that the "receiver," "trustee," or "assignee" has this obli-

gation "whether or not such property * * * is being operated" and whether he comes into possession of the corporation's assets "by order of a court * * *, by operation of law or otherwise." Section 6151(a) further requires that the taxes due on the return be paid by the person who files the return.

The legislative history of Section 6012(b)(3) supports the conclusion that the statute should be applied as comprehensively as its language indicates. Regulations under the earliest version of this section, Section 13(c) of the Revenue Act of 1916, ch. 463, 39 Stat. 771, construed the phrase "receivers, trustees in bankruptcy, or assignees" broadly to include "trustees in dissolution," who were deemed to "stand[] in the place of the corporate officers and * * * required to perform all the duties and assume all the liabilities which would devolve upon the officers of the corporation were they in control." Treas. Reg. 45, art. 622 (1919). The decisions uniformly supported this interpretation. In clarifying the language of the statute in 1954, Congress confirmed that the phrase "receiver, trustee in bankruptcy, or assignee" was intended to include any "fiduciary" acting on behalf of a corporation. Section 6012(b)(3) is thus designed to reach any situation in which substantially all the assets of a corporation are vested in a third party acting in a fiduciary capacity. The statute imposes on that fiduciary the responsibility for reporting and paying the taxes due upon income derived from the corporate assets in his possession.

The text of Section 6012(b)(3) compels the conclusion that the trustee in this case is subject to these obligations. The court of appeals' holding that the liquidating trustee is not a "trustee in a case under title 11" cannot be reconciled with the broad language and comprehensive purpose of the statute. The liquidating trust was created pursuant to a plan confirmed in a case under Title 11; the trustee was then appointed by the bankruptcy court acting under Title 11; the bankruptcy court reserved jurisdiction to implement the provisions of the plan under Title 11; and jurisdiction existed in the bankruptcy court to resolve this declaratory judgment suit solely under Title 11. Inasmuch as Title 11 is the sole source of authority for the bankruptcy court to direct the disposition of the debtors' property, it is evident that the liquidating trustee appointed by the bankruptcy court is a "trustee in a case under title 11."

The liquidating trustee also functions as an "assignee" or "receiver" within the meaning of Section 6012(b)(3). An assignee is "one to whom a right or property is legally transferred." *Webster's Third New International Dictionary* 132 (1986). The term "receiver" has been defined as "embracing any person acting as [an] agent or depository of funds for a court." *Spring Valley Water Co.* v. *San Francisco*, 246 U.S. 391, 395 (1918). Both these terms accurately describe the liquidating trustee.

In accordance with the broad statutory objective, courts have consistently applied Section 6012(b)(3) to liquidating trustees of every type and description. The holding of the court of appeals in this case—that a liquidating trustee established under a Chapter 11 plan of reorganization is uniquely exempt from the duty to report and pay taxes—defeats the statute's essential purpose by creating an entity that is free to receive income and ignore the revenue laws. This is neither what Congress intended nor what the statute provides.

II. The assets of the individual debtor's estate were also placed under the control of the liquidating trustee by the bankruptcy court. To ensure the payment of taxes on income generated by the estate of an individual in bankruptcy, Section 6012(b)(4) broadly provides that the "[r]eturns of * * * an estate of an individual [debtor] under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof." The Internal Revenue Code thereby ensures for individuals under Section 6012 (b)(4), as for corporations under Section 6012 (b)(3), that tax obligations will be borne and fulfilled by the fiduciary who possesses their property.

The court of appeals concluded, however, that the duties of the liquidating trustee were too "ministerial" for him to be a "fiduciary" of the individual debtor's estate. Pet. App. 11a. This conclusion is both factually inaccurate and legally erroneous. It is not factually correct to say that the liquidating trustee, who was authorized to manage the debtor's property "in all * * * ways as would be lawful" (Pet. App. 14a), had only "ministerial" responsibilities. It is also not correct to conclude that a fiduciary's duty to report and pay taxes under Section 6012(b)(4) turns on the extent of his discretionary powers. If the fiduciary has possession of or title to the debtor's property, and if he receives income, he is to report and pay taxes. No more is required for Sections 6012 and 6151 to apply.

ARGUMENT

THE LIQUIDATING TRUSTEE IS REQUIRED BY STATUTE TO FILE TAX RETURNS FOR THE CORPORATE DEBTORS AND FOR THE ESTATE OF THE INDIVIDUAL DEBTOR AND TO PAY THE TAXES DUE ON THE INCOME RECEIVED

The bankruptcy court approved a plan of reorganization that placed essentially all the debtors' assets into a liquidating trust. These assets included (1) the proceeds of the pre-confirmation sale of the debtors' Washington properties and (2) the debtors' Miami properties, which were sold shortly thereafter. The bankruptcy court appointed a liquidating trustee to receive and manage these assets, to conduct an orderly liquidation of them, to invest the proceeds of the liquidation and, ultimately, to distribute the liquidated assets to creditors pursuant to an approved plan (Pet. App. 42a-46a).

The sales of the debtors' properties resulted in capital gains in excess of $75 million. In addition, the trustee realized interest income in excess of $8 million from his investment of the sale proceeds. Yet, the courts below have concluded that the liquidating trustee, who holds the proceeds of these sales and the interest income derived therefrom, is not required to report either the capital gains or interest income and is not required to pay the taxes due on that income. Instead, the court has assigned those responsibilities solely to the debtors, who, because of the transfer of their assets to the liquidating trustee, evidently lack funds to satisfy the very substantial tax liabilities at issue.

The decision of the court of appeals creates a tax loophole of troubling proportions. It would allow a liquidating trustee to be appointed in a case under

Title 11, take title to the debtor's assets, invest or dispose of those assets in a manner that realizes taxable income, but neither report nor pay the taxes owed on that income. In reaching this remarkable result, the court ignored both the language and purpose of the statutory provisions enacted by Congress specifically to ensure that such a loophole would not exist.

I. The Liquidating Trustee Is "A Receiver, Trustee In A Case Under Title 11 Of The United States Code, Or Assignee" Within The Meaning Of Section 6012(b)(3) Of The Internal Revenue Code

A. Section 6012(b)(3) Requires Liquidating Trustees To File Tax Returns For Corporations

Congress has long manifested its intent that income accruing to a debtor in bankruptcy is not to escape taxation. Section 6012(b)(3), which evolved from the Revenue Act of 1916, ch. 463, § 13(c), 39 Stat. 771,[6] requires a "receiver, trustee in a case under title 11 of the United States Code, or assignee," who obtains possession of or holds title to "all or substantially all the property * * * of a corporation," to file the income tax return for that corporation. The statute emphasizes the breadth of its command by stressing that the "receiver," "trustee," or "assignee" has this obligation "whether or not such property is being operated" and whether the trustee comes into possession of the corporation's assets "by order of a court * * *, by operation of law or otherwise." 26 U.S.C. 6012(b)(3). Section 6151(a) further requires that the taxes due on the return be paid by the person who filed the return. In this manner,

[6] See *Northwest Utils. Sec. Corp.* v. *Helvering*, 67 F.2d 619, 621 (8th Cir. 1933), cert. denied, 291 U.S. 684 (1934).

Congress has ensured that the duty to report and pay taxes will follow the assets from which the income is realized and from which the tax payments should be made.

The legislative history of Section 6012(b)(3) reflects that it is part of an extensive congressional design to "protect[] the public revenues" from evasion through corporate reorganization or insolvency and—in contrast to the court of appeals' artificially narrow construction—that it should "be liberally construed to achieve this broad purpose" (*United States* v. *Key*, 397 U.S. 322, 324 (1970)).[7] See also *Bramwell* v. *United States Fidelity & Guaranty Co.*, 269 U.S. 483, 487 (1926). Prior to ratification of the Sixteenth Amendment, which led to the general income tax, Congress imposed an excise tax on the income of "every corporation * * * with respect to the carrying on or doing business by such corporation." Act of

[7] The legislative history of the Bankruptcy Code also reflects the congressional policy that the bankruptcy laws should not be applied in a manner that avoids tax obligations:

> [T]ax collection rules for bankruptcy cases have a direct impact on the integrity of the Federal, State and local tax systems. These tax systems generally based on voluntary assessment, work to the extent that the majority of taxpayers think they are fair. This presumption of fairness is an asset which should be protected and not jeopardized by permitting taxpayers to use bankruptcy as a means of improperly avoiding their tax debts. To the extent that debtors in a bankruptcy are freed from paying their tax liabilities, the burden of making up the revenues thus lost must be shifted to other taxpayers.

S. Rep. No. 989, 95th Cong., 2d Sess. 13-15 (1978). See also S. Rep. No. 999, 89th Cong., 2d Sess. 9 (1966) ("reliev[ing] the bankrupt of his tax liabilities could materially harm taxpayer morale in this country and thereby adversely affect the self-assessment revenue system").

Aug. 5, 1909, ch. 6, § 38, 36 Stat. 112. This Court held in *United States* v. *Whitridge*, 231 U.S. 144 (1913), that receivers were not subject to the tax, noting that the law did not "in terms impose any duty upon the receivers of corporations or of corporate property, with respect to paying taxes upon the income arising from their management of the corporate assets, or with respect to making any return of such income." *Id.* at 149.[8] Congress responded to the *Whitridge* decision by enacting the predecessor of Section 6012(b)(3), Section 13(c) of the Revenue Act of 1916, ch. 463, 39 Stat. 771, which provided that "receivers, trustees in bankruptcy, or assignees * * * operating the property or business of corporations * * * shall make returns * * * for such corporations." [9]

Treasury Regulations promulgated in 1919 under the first reenactment of this provision (Revenue Act of 1918, ch. 18, § 239, 40 Stat. 1081) reflected the broad sweep of this statute by construing the phrase "receivers, trustees in bankruptcy, or assignees" to include "trustees in dissolution," who were deemed to "stand[] in the place of the corporate officers and * * * required to perform all the duties and assume all the liabilities which would devolve upon the officers of the corporation were they in control." Treas.

[8] The first general income tax, Act of Oct. 3, 1913, ch. 16, § II A, 38 Stat. 166, also omitted an express reference to receivers of corporate property and was similarly held not to subject such receivers to tax. Sss *Scott* v. *Western Pac. R.R.*, 246 F. 545 (9th Cir. 1917).

[9] See Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws—Income Tax Liabilities of the Estate and the Debtor*, 72 Mich. L. Rev. 937, 940-941 (1974).

Reg. 45, art. 622 (1919). Article 547 of this regulation explained (emphasis added):

> *When a corporation is dissolved its affairs are usually wound up by a receiver or trustee in dissolution.* The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustee stands in the stead of the corporation for such purposes. *Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining gain or loss.*

The comprehensive application of this statute to receivers and liquidating trustees has been reemphasized in the numerous, subsequent promulgations of the regulations.[10] In the last substantive revision of this statute in the 1954 Code, Congress again confirmed that the phrase "receiver, trustee in bankruptcy, or assignee" in Section 6012(b)(3), 26 U.S.C. 6012 (1976), was intended to include any "fiduciary" acting on behalf of a corporation. See H.R. Rep. No. 1337, 83d Cong., 2d Sess. A396 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 563 (1954).[11]

[10] See, *e.g.*, Treas. Reg. 69, arts. 548, 622 (1926); Treas. Reg. 74, arts. 71, 392 (1931); Treas. Reg. 103, § 19.52-2 (1939 Code); Treas. Reg. 111, § 29.22(a)-20 (1939 Code); Treas. Reg. 118, §§ 39.52-2, 39.22(a)-20 (1939 Code). The current Treasury Regulations similarly provide that the filing requirements apply to a "trustee in dissolution" (Treas. Reg. § 1.6012-3(b)(4)), and that gain is recognized by liquidating corporations on sales made "directly or indirectly (as through trustees or a receiver)" (Treas. Reg. § 1.336-1).

[11] Under the pre-1954 versions of Section 6012(b)(3), a fiduciary was subject to corporate return filing requirements only if he was "operating the business or property" of a corporation. The 1954 Code eliminated the uncertainty that had developed in the case law concerning whether liquidating

In accordance with Congress's broad objective to ensure the reporting and payment of taxes on income earned on corporate assets held in others' hands, courts have applied Section 6012(b)(3) and its predecessors to "the assignee of corporate property, engaged in its orderly liquidation" (*Louisville Property Co.* v. *Commissioner*, 140 F.2d 547 (6th Cir.), cert. denied, 322 U.S. 754 and 755 (1944)), to sales of real estate by a "trustee (of a corporation) in dissolution for the benefit of creditors" (*United States* v. *Loo*, 248 F.2d 765, 766 (9th Cir. 1977), cert. denied, 356 U.S. 928 (1958)), to sales of real estate by a trustee in a bankruptcy "liquidation" of the corporation (*United States* v. *Sampsell*, 266 F.2d 631, 633 (9th Cir. 1959)), and to the realization of gain from the sale of corporate assets and the receipt of "passive income from interest" by a "non-operating trustee" in a bankruptcy liquidation (*In re Sapphire S.S. Lines, Inc.*, 762 F.2d 13, 14-15 (2d Cir. 1985). See also *In re Bentley*, 916 F.2d 431, 432 (8th Cir.

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trustees in bankruptcy were "operating" the property of their debtors by directly imposing the filing requirements on fiduciaries "whether or not such property or business is being operated" (26 U.S.C. 6012(b)(3)). See H.R. Rep. No. 1337, *supra*, at A396; S. Rep. No. 1622, *supra*, at 563. See also Plumb, *supra*, 72 Mich. L. Rev. at 943.

The Bankruptcy Tax Act of 1980, Pub. L. No. 96-589, § 6(i), 94 Stat 3410, modified the language of the statute by substituting the words "trustee in a case under title 11 of the United States Code" for "trustee in bankruptcy." The legislative history makes clear that the change was intended only to "substitute references to bankruptcy cases under new title 11 of the U.S. Code for references to bankruptcy proceedings under the now-repealed Bankruptcy Act." S. Rep. No. 1035, 96th Cong., 2d Sess. 52 (1980).

1990)).[12] Affording the statute a construction consistent with its comprehensive text and evident purpose, the Third Circuit held that a trustee appointed by the court to liquidate an estate in bankruptcy was subject to the tax reporting and payment obligations of Sections 6012(b)(3) and 6151(a):

> [W]e think that a fair reading of the pertinent sections of the Internal Revenue Code renders the non-operating trustee of a bankrupt corporation liable for the payment of taxes on the bankrupt's income, provided the trustee has possession of, or title to, substantially all the bankrupt's property.

In re I.J. Knight Realty Corp., 501 F.2d 62, 66 (3d Cir. 1974).

B. *Section 6012(b)(3) Applies To The Liquidating Trustee In This Case*

The court of appeals' decision in this case creates an artificial category, described as "contract trustees," which the court exempts from the tax reporting and payment obligations of Sections 6012(b) and 6151

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[12] The breadth of the responsibility of these fiduciaries is underscored by other Internal Revenue Code provisions. Section 6903(a) provides that "[u]pon notice to the Secretary that any person is acting for another person in a fiduciary capacity, such fiduciary shall assume the powers, rights, duties, and privileges of such other person in respect of a tax imposed by this title." Among the "duties" assumed by such a fiduciary are the responsibilities for filing returns and paying the taxes due. See Krause & Kapiloff, *The Bankrupt Estate, Taxable Income and the Trustee in Bankruptcy*, 34 Fordham L. Rev. 401, 402-403 (1966). See also 28 U.S.C. 960 (requiring "[a]ny officers and agents conducting any business under authority of a United States court" to pay all federal, state and local taxes applicable to the business).

(a). There is no precedent for such a category; indeed, a computer search reveals that the term "contract trustee" appears not to have been used before in any context in any decision ever issued by a federal court. Moreover, as the facts of this case demonstrate, an exemption afforded to a "contract trustee" creates the very evil that the statute is designed to avoid.

1. *The Liquidating Trustee Is A Trustee "In A Case Under Title 11"*

On the effective date of the reorganization plan, essentially all the debtors' assets passed to the liquidating trustee who had been appointed by the bankruptcy court. The court of appeals ruled that the liquidating trustee, who holds the proceeds of the sales of the debtors' properties and the interest income derived from the investment of those proceeds, is not required to report that income or to pay any tax that might be due.[13] This shifting of the tax burden to the insolvent debtor for income realized by the trustee would, as a practical matter, allow the taxes to escape payment. See Pet. App. 16a (Cox,

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[13] The Washington properties were sold before the liquidating trustee was appointed. But the returns of the corporate debtors for the taxable year during which the Washington properties were sold (ending July 31, 1985) were not due until October 15, 1985. 26 U.S.C. 6072(b). On October 10, 1985, the trustee was vested with the corporate assets, including the proceeds of the sale of the Washington properties. The return filing obligations of the trustee thus extend to the 1985 taxable year (including the Washington property sale) as well as later years. See *Nicholas* v. *United States*, 384 U.S. 678, 692-693 (1966). See also *In re Hudson Oil Co.*, 91 Bankr. 932, 946 (Bankr. D. Kan. 1988) (trustee must file all returns due, "even though the taxable year may have ended prior to the filing of the petition").

J., dissenting).[14] The comprehensively worded and broadly intended mission of Section 6012(b)(3)—to capture and tax income received into the hands of the "receiver," "trustee" or "assignee" who holds "substantially all the [assets]" of the corporation—would thus be defeated.

The court of appeals' holding—that the liquidating trustee is not a "trustee in a case under title 11"—cannot be reconciled with the operative statutory language. The liquidating trust was created pursuant to a plan confirmed under Title 11 (11 U.S.C. 1129); the trustee was then appointed by a court that drew its jurisdiction from Title 11 (11 U.S.C. 105); and jurisdiction existed in the bankruptcy court to resolve this adversary proceeding solely under Title 11 (11 U.S.C. 505(a)).[15] Since Title 11 is the sole source of authority for the bankruptcy court to direct the disposition of the property of the debtors, it must follow

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[14] By contrast, in *In re Bentley*, 916 F.2d 431 (8th Cir. 1990), the court of appeals specifically rejected the suggestion that the insolvent debtor, rather than his liquidating trustee, should be responsible for taxes on gains realized and interest income received by the trustee. *Id.* at 432. In reaching this conclusion, the court noted that (*id.* at 433)

> a contrary holding would have the effect of burdening the debtor's fresh start under the bankruptcy law.

See also *Grogan* v. *Garner*, 111 S. Ct. 654, 659 (1991).

[15] 28 U.S.C. 2201(a), which prohibits declaratory judgments "with respect to Federal taxes," contains an exception for "a proceeding under section 505 * * * of Title 11." *Ibid.* This exception permits the bankruptcy court to determine tax controversies of the debtor or the debtor's estate but does not extend to tax controversies of third parties. See *In re Brandt-Airflex Corp.*, 843 F.2d 90, 96 (2d Cir. 1988); *United States* v. *Huckabee Auto Co.*, 783 F.2d 1546, 1549 (11th Cir. 1986).

that the liquidating trustee appointed by the bankruptcy court is a "trustee in a case under title 11." [16]

The court of appeals apparently was of the view that the phrase "trustee in a case under title 11 of the United States Code" refers only to trustees appointed under a single section of the Bankruptcy Code (11 U.S.C. 1104(a)) which deals with trustees appointed to manage the debtor's estate in a Chapter 11 reorganization. See Pet. App. 11a. By its terms, however, Section 6012(b)(3) refers not to any single bankruptcy provision or chapter, but instead generically to all trustees appointed "in a case under title 11." That phrase necessarily encompasses the liquidating trustee in this case, whose authority derives from that of the bankruptcy court "in a case under title 11."

The phrase "trustee in a case under title 11" is not defined in Section 6012(b)(3). The legislative history reflects, however, that this phrase was intended to have the same meaning that the phrase "trustee in bankruptcy" had been given under the repealed Bankruptcy Act. See S. Rep. No. 1035, 96th Cong., 2d Sess. 52-53 (1980); note 11, *supra*. This earlier phrase, while also not expressly defined in the Bankruptcy Act,[17] has long been construed by regulations issued

[16] Indeed, at other points in this proceeding, the trustee has asserted that he is "a trustee acting in a case under title 11" within the meaning of an exception to the insolvency provisions of 31 U.S.C. 3713. See 3 C.A. App., Doc. 21, at 35. Section 3713(a)(1) gives first priority to claims of the United States if a person is insolvent. Section 3713(a)(2), invoked by the trustee, provides an exception to this rule for "a case under title 11." 31 U.S.C. 3713(a)(2).

[17] 11 U.S.C. 1(31) (1976) did define the term "[t]rustee" as including "all of the trustees * * * of an estate." No similar definition is contained in the Bankruptcy Code.

under the predecessors to Section 6012(b)(3) to include fiduciaries of all types, including liquidating trustees ("trustees in dissolution"), serving under the authority of the bankruptcy courts. See pp. 16-19, *supra*; note 21, *infra*.[18] This contemporaneous and consistent administrative construction of the statute is entitled to considerable deference. As this Court has frequently held, when the Commissioner adopts an interpretation of the general provisions of a tax statute:

> [T]his Court customarily defers to the regulation, which "if found to 'implement the congressional mandate in some reasonable manner,' must be upheld."

National Muffler Dealers Ass'n v. *United States*, 440 U.S. 472, 476 (1979) (quoting *United States* v.

[18] The phrase "trustee in bankruptcy" also appeared in Section 274(a) of the Revenue Act of 1934, ch. 277, 48 Stat. 744, which required a "trustee in bankruptcy" to give notice of his qualification to the Commissioner. See *Manning* v. *Seeley Tube & Box Co.*, 338 U.S. 561, 562-563 n.2 (1950). The regulations under that section had construed the phrase "trustee in bankruptcy" to include "*a trustee*, receiver, debtor in possession, *or other person designated as in control of the assets of the debtor in any bankruptcy proceeding by order of the court* in which such proceeding is pending." Treas. Reg. 103, § 19.274-1 (1939 Code) (emphasis added). See also *Harris* v. *Commissioner*, 32 T.C. 1216, 1217 (1959) (noting that this regulation applied to "trustees or other persons in possession of assets").

Section 274(a) was succeeded by Section 6036 of the Internal Revenue Code of 1954. Current regulations (Treas. Reg. § 301.6036-1(a)) no longer require that trustees appointed by the bankruptcy court give notice under Section 6036 because the notice that the Service was receiving in any event under the new Bankruptcy Rules was "sufficient for its purposes." T.D. 8172, 1988-1 C.B. 384.

Cartwright, 411 U.S. 546, 550 (1973) (quoting *United States* v. *Correll*, 389 U.S. 299, 307 (1967))).[19]

There is thus no proper basis for interpreting the phrase "trustee in a case under title 11" to exclude liquidating trustees. The phrase has long been applied broadly to refer to any "person designated as in control of the assets of the debtor" in a bankruptcy case, and courts consistently have concluded that liquidating trustees appointed by bankruptcy courts are subject to the filing requirements of Section 6012(b)(3). See, *e.g.*, *In re Sapphire S.S. Lines*, 762 F.2d at 15; *In re I.J. Knight Realty Corp.*, 501 F.2d at 15; *United States* v. *Sampsell*, 266 F.2d at 636; *In re Knight's Mill, Inc.*, 24 Bankr. 143, 145-146 (Bankr. E.D. Mich. 1982). In this manner, the courts have achieved the basic purpose of these statutes by ensuring that tax obligations have been borne and fulfilled by the fiduciaries who possessed the assets that generated the income.

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[19] Deference is afforded to the Commissioner's interpretations of the tax statutes because:

> "Congress has delegated to the * * * Commissioner [of Internal Revenue], not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code. 26 U.S.C. § 7805(a)." *United States* v. *Correll*, 389 U.S. at 307. That delegation helps ensure that in "this area of limitless factual variations," *ibid.*, like cases will be treated alike. It also helps guarantee that the rules will be written by "masters of the subject," *United States* v. *Moore*, 95 U.S. 760, 763 (1878), who will be responsible for putting the rules into effect.

National Muffler Dealers Ass'n v. *United States*, 440 U.S. at 477.

2. *The Liquidating Trustee Also Functioned As An "Assignee" Or A "Receiver"*

Section 6012(b)(3) requires a fiduciary of a corporation to file returns if he acts either as an "assignee" or as a "receiver" of all or substantially all of the property of the corporation. 26 U.S.C. 6012(b)(3). The terms "assignee" and "receiver" accurately describe the function performed by the liquidating trustee in this case.

Although the term "assignee" is not defined by Section 6012(b)(3) or the regulations thereunder, some guidance as to its meaning may be found in the Treasury Regulations under Section 6036. That provision requires an "assignee for benefit of creditors" to give notice of his qualifications to the Secretary of the Treasury. See note 18, *supra*. The regulations under this statute define the phrase "assignee for benefit of creditors" as:

> [*A*]*ny person who*, by authority of law, by the order of any court, by oral or written agreement, or in any other manner acquires control or possession of or title to all or substantially all the assets of a debtor, and who under such acquisition *is authorized to use, reassign, sell, or in any manner dispose of such assets so that the proceeds from the use, sale or other disposition may be paid to or may inure directly or indirectly to the benefit of a creditor or creditors of such debtor.*

Treas. Reg. § 301.6036-1(a)(3) (emphasis added). The language of Section 6012(b)(3) is broader than that of Section 6036, for it is not restricted to assignees "for benefit of creditors." The regulations under Section 6036, however, precisely describe the liquidating trustee in this case. These regulations

also reflect the ordinary usage of the term "assignee," defined by *Webster's Third New International Dictionary* 132 (1986), as "one to whom an assignment is made," "one appointed to act for another," or "one to whom a right or property is legally transferred." See also Restatement (Second) of Contracts § 317(1) (1981) ("assignee" is one to whom a right is transferred). Accordingly, whether based upon administrative interpretation or ordinary usage, it is evident that the liquidating trustee, who received legal title to all of the debtors' property, is an "assignee" with the responsibility of filing returns and paying taxes under Sections 6012(b)(3) and 6151.

The liquidating trustee also functioned as a receiver. The term "receiver" has been described by this Court as "embracing any person acting as [an] agent or depository of funds for a court." *Spring Valley Water Co.* v. *San Francisco*, 246 U.S. 391, 395 (1918). In interpreting the term "receiver" under the Internal Revenue Code, the Board of Tax Appeals observed in *Financial & Industrial Sec. Corp.* v. *Commissioner*, 27 B.T.A. 989, 993 (1933):

> It requires but a cursory examination of the subject of receiverships to realize the multitude of variations in proceedings to which the term may be aptly applied. Congress, with this information readily at hand, may be presumed to have used the broad term deliberately.

See also *Want* v. *Alfred M. Best Co.*, 233 S.C. 460, 485, 105 S.E.2d 678, 691 (1958).[20] Treasury regula-

[20] See also *Jacoby* v. *Bond & Mortgage Guarantee Co.*, 72 F.2d 420, 423 (2d Cir.) (party in possession of assets of corporation functions as a "receiver"), cert. denied, 293 U.S. 619 (1934); *Tolfree* v. *New York Title & Mortgage Co.*, 72

tions have thus long provided that the return filing requirement applies to receivers "engaged in * * * marshaling, selling, and disposing of [a corporation's assets for purposes of liquidation." Treas. Reg. 118, § 39.52-2 (1939 Code). See also *Pinkerton* v. *United States*, 170 F.2d 846, 847-848 (7th Cir. 1948) (applying statute to "liquidating receiver"); Treas. Reg. § 1.6012-3(b)(4) (applying statute to a "trustee in dissolution"). As this Court stated in a similar context in *Spring Valley Water Co.* v. *San Francisco*, 246 U.S. at 395, "[t]o give the word ["receiver"] the narrower meaning contended for would defeat the obvious and adjudged purpose of the statute."

3. *The Liquidating Trustee Is Not Exempt From The Duty To Report And Pay Taxes On The Theory That He Is A "Contract Trustee" Who Performs "Essentially Ministerial Duties"*

The court of appeals departed from the decisions that have held liquidating trustees subject to the duty to report and pay taxes by affording controlling significance to a label designated as "contract trustee." This term is entirely unfounded. It has no history in the law and fails accurately to describe the source of the trustee's authority, which is derived wholly from court order. Moreover, the court offered no explanation why a liquidating trustee (denominated by the court as a "contract trustee") appointed in a case under Title 11 should be treated differently from assignees for benefit of creditors, trustees in dissolution, receivers or other liquidating trustees—whose common characteristic is that they posesss the prop-

F.2d 702, 704 (2d Cir. 1934) (same), cert. denied, 293 U.S. 619 (1934); *Banco di Napoli Agency in New York* v. *Commissioner*, 1 T.C. 8 (1942) (same).

erty of a taxpayer for purposes of liquidation and who have consistently been held to fall within the broad sweep of Section 6012(b) or its predecessors. See, *e.g.*, *Hersloff* v. *United States*, 310 F.2d 947 (Ct. Cl. 1962), cert. denied, 373 U.S. 923 (1963); *United States* v. *Loo*, 248 F.2d at 768; *Louisville Property Co.* v. *Commissioner*, 140 F.2d at 547; *Kavanagh* v. *First Nat'l Bank*, 139 F.2d 309 (6th Cir. 1943); *First Nat'l Bank* v. *United States*, 86 F.2d 938 (10th Cir. 1936); *Northwest Utils. Sec. Corp.* v. *Helvering*, 67 F.2d 619, 621 (8th Cir. 1933), cert. denied, 291 U.S. 684 (1934).[21]

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[21] See also *National Metropolitan Bank* v. *United States*, 345 F.2d 823, 825 (Ct. Cl. 1965) (assignee of liquidating bank); *J. Ungar, Inc.* v. *Commissioner*, 244 F.2d 90, 92 (2d Cir. 1957) (assignee "for purposes of liquidation"); *Pinkerton* v. *United States*, 170 F.2d 846, 848 (7th Cir. 1948) ("operating receiver"); *Security First Nat'l Bank* v. *United States*, 153 F.2d 563, 565 (9th Cir. 1946) ("trustee in bankruptcy"); *Kavanagh* v. *First Nat'l Bank*, 139 F.2d 309, 312 (6th Cir. 1943) ("receiver"); *First Nat'l Bank of Greeley* v. *United States*, 86 F.2d 938, 941 (10th Cir. 1936) (trustee for corporation); *Tazewell Elec. Light & Power Co.* v. *Strother*, 84 F.2d 327, 329 (4th Cir. 1936) (liquidating trustee); *Whitney Realty Co.* v. *Commissioner*, 80 F.2d 429, 431 (6th Cir. 1935), cert. denied, 298 U.S. 668, 669 (1936) ("liquidating agent"); *Hellebush* v. *Commissioner*, 65 F.2d 902, 903 (6th Cir. 1933) (trustees to effect "final liquidation"); *Taylor Oil & Gas Co.* v. *Commissioner*, 47 F.2d 108, 109 (5th Cir. 1931), cert. denied, 283 U.S. 862 (1931) ("liquidating trustees"); *United States* v. *McDonald & Eide, Inc.*, 670 F. Supp. 1226, 1233 n.6 (D. Del. 1987), aff'd, 865 F.2d 73 (3d Cir. 1989) ("receiver"); *Smith* v. *Commissioner*, 26 B.T.A. 1178, 1187 (1932) ("trustees in liquidation"); *State ex rel. Gibson* v. *American Bonding & Case Co.*, 225 Iowa 638, 281 N.W. 172 (1938) ("liquidating receiver"). Cf. *In re Loehr*, 98 F. Supp. 402 (E.D. Wis. 1950) (holding court-appointed liquidating trustee required to file returns under 28 U.S.C. 960).

The court of appeals attempted to justify its exemption for "contract trustee[s]" from the scope of Section 6012(b) on the theory that the liquidating trustee was appointed to perform "limited and essentially ministerial duties" (Pet. App. 11a). This characterization is without legal significance and is, in any event, incorrect. The duties of the liquidating trustee include the responsibility to hold, sell and invest assets, receive the income from those assets, enter into contracts, incur and pay expenses, and, ultimately, to make distributions in accordance with the confirmed plan. See Pet. App. 42a-46a. As Judge Cox stated in dissent, to describe these duties as "ministerial" (*id.* at 14a-15a)

> denies the reality of [the trustee's] rights, duties and obligations under the Plan. A mere label does not magically transform the liquidating trustee into something he is not. In fact, his job description squarely fits within the Internal Revenue Code description of a "fiduciary."

Moreover, the statute governing this case makes no distinction turning on the breadth of discretion afforded to the "trustee," "receiver" or "assignee." Instead, regardless of the scope of their discretion, the statute requires fiduciaries to report and pay taxes if they have "possession of or hold[] title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated." 26 U.S.C. 6012(b)(3); see § 6151. The authority of the persons who have been held responsible for taxes under Section 6012 has been derived from a variety of sources: state statutes (*Hersloff* v. *United States*, 310 F.2d 947 (Ct. Cl. 1962), cert. denied, 373 U.S. 923 (1963); *United States* v. *Loo*, 248 F.2d 765 (9th Cir. 1957), cert.

denied, 356 U.S. 928 (1958)); federal statutes (*In re Joplin*, 882 F.2d 1507 (10th Cir. 1989); *In re I.J. Knight Realty Corp.*, 501 F.2d 62 (3d Cir. 1974); *United States* v. *Sampsell*, 266 F.2d 631 (9th Cir. 1959); *Kavanagh* v. *First Nat'l Bank*, 139 F.2d 309 (6th Cir. 1943)); and deeds of assignment or trust (*Louisville Property Co.* v. *Commissioner*, 140 F.2d 547 (6th Cir.), cert. denied, 322 U.S. 754 and 755 (1944); *First Nat'l Bank* v. *United States*, 86 F.2d 938 (10th Cir. 1936); *Northwest Utils. Sec. Corp.* v. *Helvering*, 67 F.2d 619 (8th Cir. 1933), cert. denied, 291 U.S. 684 (1934)). See also note 21, *supra*. But the scope of the authority conferred on these fiduciaries—beyond the basic authority to dispose of assets and invest proceeds—was not a point of importance in any of these cases. The relevant similarities between these fiduciaries were (i) that they administered all or substantially all of a debtor's property and (ii) that their administration of that property resulted in taxable income. See *In re I.J. Knight Realty Corp.*, 501 F.2d at 66. If they have possession or title to the debtors' property and if they receive income generated by that property, they are to report and pay taxes. No more is required for Sections 6012 and 6151 to apply.

A contrary conclusion—that liquidating trustees established in Chapter 11 plans of reorganization are exempt from the duty to report and pay taxes—would eviscerate the basic purpose of the statute. The court of appeals' decision has sanctioned the creation of an entity that is free to receive income and ignore the revenue laws. There can be little doubt that creditors would have every inclination to approve reorganization plans, such as the one in this case, that would permit them to enhance their distributions at the expense of the public fisc. Under the court of appeals' approach, it would be the rare liquidation indeed in which taxes would be paid on the sale of appreciated corporate assets and the interest earned on the proceeds of those sales. This is plainly not what Congress had in mind in enacting Section 6012(b)(3). To the contrary, as the Ninth Circuit observed in rejecting the argument that a liquidating trustee is not required to pay taxes under Section 6012(b)(3):

> We can see no reason why in an act to raise revenue there should be imputed to Congress such an exception of the principal portion, indeed almost all, of the area of income producing activities in bankruptcy proceedings.

United States v. *Metcalf*, 131 F.2d 677, 679 (9th Cir. 1942), cert. denied, 318 U.S. 769 (1943).

II. The Liquidating Trustee Is A "Fiduciary" Of The Individual Debtor's Estate Within The Meaning Of Section 6012(b)(4)

Under the plan of reorganization in this case, the bankruptcy court appointed a trustee for all property of the estates of the debtors, including the property of the estate of the individual debtor, Theodore B. Gould. Pet. App. 43a. Section 6012(b)(4) provides that the "[r]eturns of * * * an estate of an individual debtor under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof." As with Section 6012(b)(3) in the case of corporate debtors, Section 6012(b)(4) ensures for individual debtors in bankruptcy that their tax obligations are borne and fulfilled by the fiduciary who possesses the property of their estate. The court of appeals erred in concluding that the liquidating trustee was not subject to this statute.

The filing of a petition for relief under the Bankruptcy Code has different tax consequences for individuals than for corporations. When a corporation files for relief, no new taxable entity is created. 26 U.S.C. 1399. When an individual files for relief in bankruptcy court, however, a separate taxable entity, the debtor's estate, is created. 26 U.S.C. 1398.[22] Section 1398 of the Internal Revenue Code contains detailed provisions governing the estate's succession to the individual debtor's tax attributes at the commencement of the bankruptcy case and the debtor's

[22] Since the individual debtor will continue to earn wages and acquire post-petition property apart from the estate, he is treated as a separate taxable entity with his own tax obligations. H.R. Rep. No. 833, 96th Cong., 2d Sess. 20 n.2 (1980); S. Rep. No. 1035, 96th Cong., 2d Sess. 25 n.2 (1980). The trustee under Chapter 7 or 11 who assumes the estate property reports income and pays tax for the estate.

In contrast, when an individual debtor files for relief under Chapter 13, he retains the property of the estate (unless he agrees to do otherwise in the repayment plan, 11 U.S.C. 1306) and repays his debts out of future income. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 118 (1977). Accordingly, he is treated, with his estate, as a single taxable entity and includes on his tax returns income arising from the use or disposition of estate property. 26 U.S.C. 1398(a), 1399; see H.R. Rep. No. 833, *supra*, at 20 n.2; S. Rep. No. 1035, *supra*, at 25 n.2. The Chapter 13 trustee, unlike a liquidating trustee who must collect and reduce to money the property of the estate, distributes to creditors regular payments made to him by the debtor. 11 U.S.C. 1322(a)(1). Although the Chapter 13 trustee is "no mere disbursing agent," inasmuch as he bears certain additional responsibilities (S. Rep. No. 989, *supra*, at 139; 11 U.S.C. 1302(b)), he functions in much the same way as a disbursing agent and is not subject to return filing obligations. See note 24, *infra*.

reacquisition of those attributes upon the termination of the bankruptcy estate.[23]

When the debtor's property and tax attributes are transferred to the bankruptcy estate, the obligation to report and pay taxes on income arising from the use and disposition of the property is placed on the trustee. To make this clear, the Bankruptcy Tax Act of 1980 amended Section 6012(b)(4)—which theretofore had required the fiduciary of "an estate or a trust" to make returns of income for those entities—to require specifically that the fiduciary of "an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11" is to make such returns. Pub. L. No. 96-589, § 3(b)(2), 94 Stat. 3401; see *In re Joplin*, 882 F.2d at 1510 (trustee in Chapter 7 case required to file return for individual debtor's estate under former Section 6012(b)(4)). When estate property revests in the debtor, the debtor must assume responsibility for taxes arising from its subsequent use or disposition. *In re Olson*, 930 F.2d 6, 8 (8th Cir. 1991); *United States* v. *Redmond*, 36 Bankr. 932, 934 (D. Kan. 1984). In this case, however, the property of the estate was vested in the liquidating trust, and it was the trust that received the capital gains and interest income generated by the property. It is therefore the liquidating trustee, not the debtor, who must file returns reporting the income arising from his administration of the property.

[23] For example, when the debtor's property vests in the estate at the commencement of the case, the estate succeeds to the debtor's basis in the property. 26 U.S.C. 1398(g)(6). When the property revests in the debtor (for example, upon confirmation of a Chapter 11 plan that does not provide for the property to vest elsewhere, 11 U.S.C. 1141(b)), the debtor reacquires that basis. 26 U.S.C. 1398(i).

Without examining the underlying purpose of Section 6012(b)(4), the court of appeals rejected this straightforward application of the statute because, in the court's view, the trustee's "non-discretionary duties of distributing the trust property in accordance with the terms of the Plan makes [*sic*] him similar to a disbursing agent rather than * * * [a] fiduciary" (Pet. App. 11a-12a). This conclusion ignores the broad meaning of the term "fiduciary" in Section 6012(b)(4) and incorrectly describes the nature of the administrative powers of the trustee under the plan.[24]

A "fiduciary" is defined broadly in Section 7701 (a)(6) of the Internal Revenue Code as "a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity." 26 U.S.C. 7701(a)(6). The regulations under this statute provide that "[a] fiduciary is a person who holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest, or receives and controls income of another, as in the case of receivers." Treas. Reg. § 301.7701-6. These definitions plainly encompass the liquidating trustee in this case.

This Court has held in analogous contexts that the term "fiduciary" should be given its generic, ordinary meaning in interpreting statutes. In construing Section 249 of the former Bankruptcy Act, 11 U.S.C. 649 (1976),[25] the Court stated, in words equally applicable to the present case:

> [T]o define "fiduciary" in [the statute] as narrowly as has the Court of Appeals would invite a form of evasion and circumvention which could readily defeat the whole purpose of the statute's prophylactic rule. * * * [T]he mere shifting of titles could enable the very class at which the regulation was directed to avoid its prohibitions. Congress plainly did not indulge in an exercise in futility in enacting [the statute].

Wolf v. *Weinstein*, 372 U.S. 633, 645 (1963). The same comprehensive application of the term "fiduciary" in Section 6012(b)(4) is necessary and appropriate to ensure that tax liabilities arising from the administration of a debtor's property are reported and paid by the person responsible for administering the property. A narrow construction of the term would thwart that purpose. See note 14, *supra*.

In view of the extensive powers and duties vested in the trustee under the reorganization plan, however,

[24] The court of appeals erred in relying on *In re Alan Wood Steel Co.*, 7 Bankr. 697 (Bankr. E.D. Pa. 1980), to classify the liquidating trustee as a "disbursing agent." *Alan Wood Steel* was decided under the old Bankruptcy Act, which provided for the appointment of bankruptcy trustees under Section 44(a), 11 U.S.C. 72(a) (1976), receivers under Section 332, 11 U.S.C. 732 (1976), and disbursing agents under Section 337(1), 11 U.S.C. 737(1) (1976). The bankruptcy court in *Alan Wood Steel* recognized this distinction, and stated that a "disbursing agent does not have possession of or hold title to all or substantially all the business or property of the debtor corporation * * * [and] has only the power 'to distribute, subject to the control of the court, the consideration, if any, to be deposited by the debtor.'" 7 Bankr. at 701. By comparison, in the instant case, the liquidating trustee *does* have title to all the property, as well as the power to sell and convert the trust property and distribute the proceeds. The statutorily defined disbursing agent under the old Bankruptcy Act and the liquidating trustee in the instant case are fundamentally dissimilar.

[25] This statute prohibited the allowance of claims for compensation by persons "acting * * * in a * * * fiduciary capacity" who make unauthorized trades in a debtor's stock. 11 U.S.C. 649 (1976).

the liquidating trustee in this case could fit even within a far narrower reading of the statute. Under the terms of the plan, the property of the individual debtor's estate vested in the trustee. The trustee enjoys the authority not only to liquidate the property but to deal with the property "in all other ways as would be lawful for any person owning the same to deal therewith," including the authority to manage and operate the property and to lease, improve and encumber it. He may sue and be sued. He is also allowed to exercise substantial powers affecting the debtors, most notably, the power to settle litigation in which the debtors are involved and to waive rights on behalf of the debtors. See Pet. App. 43a-46a. Contrary to the court of appeals' holding, the trustee's duties and powers thus are not limited and "ministerial" but are fully comparable to those commonly exercised by executors, administrators, receivers and other fiduciaries. The liquidating trustee must therefore file tax returns for the estate of the individual debtor and pay the taxes due on those returns. See *In re Bentley*, 916 F.2d at 432-433; *In re Joplin*, 882 F.2d at 1510 (liquidating trustee is a "fiduciary" required to report and pay taxes under Sections 6012 (b)(4) and 6151).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 1991

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(10) (11)

Nos. 90-1361, 90-1484

In The

Supreme Court of the United States

October Term, 1991

HOLYWELL CORPORATION, et al.,

Petitioners,

v.

FRED STANTON SMITH, LIQUIDATING TRUSTEE, et al.,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

FRED STANTON SMITH, LIQUIDATING TRUSTEE, HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, THEODORE B. GOULD, and THE BANK OF NEW YORK,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT SHUTTS & BOWEN

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QUESTION PRESENTED

Whether the common-fund doctrine is applicable so as to allow an equitable lien in favor of special counsel to the trustee and against the fund preserved and created by said counsel prior to the government's claim for taxes.

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BRIEF FOR RESPONDENT SHUTTS & BOWEN

STATEMENT[1]

Respondent, Shutts & Bowen, was appointed as special counsel to the liquidating trustee to prosecute and defend certain litigation originally pending against some of the debtors in this Chapter 11 proceeding. (Pet. App. 20a). In this capacity Shutts & Bowen was awarded its fees and costs that were incurred in connection with this representation by the bankruptcy court. *Id.*

Prior to this award, however, the liquidating trustee filed an adversary proceeding in the bankruptcy court seeking, *inter alia*, declaratory judgment that the liquidating trustee was not required to either file the income tax returns, or pay the taxes that are at issue in this appeal. (Smith Br. in Opp. App. 6a). When the bankruptcy court issued its opinion that the liquidating trustee was not responsible to either file the returns, or pay the taxes, the debtors and the United States took appeals to the district court and the United States filed an emergency motion to stay the effect of the bankruptcy court's opinion. Shutts & Bowen thereafter filed a motion to intervene in the district court proceedings. (Pet. App. 20a). Both of these motions were granted by the district court on June 20, 1988. *Id.* As a result of the court's ruling on the government's emergency motion, the trustee was prohibited from disbursing any funds from the trust, including

[1] Although Shutts & Bowen does not disagree with the Statements made by petitioners, neither Statement addresses the factual predicate for Shutts & Bowen's position in this case.

respondent's fee and cost award, pending the court's decision on the government's appeal of the bankruptcy court's opinion. *Id.*

In its papers filed with the district court, Shutts & Bowen took no position on the merits, but rather argued that under the common-fund doctrine, as explained by this Court in *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980), it was entitled to receive its previously awarded fees and costs prior to any taxes that might subsequently be found to be due and owing by the trustee at least to the extent of the funds that existed in the trust attributable to the efforts of Shutts & Bowen. To this extent, Shutts & Bowen requested that the stay be lifted as to it so as to enable the trustee to pay the fee and cost award.

On July 31, 1989 the district court affirmed the bankruptcy court's opinion, and vacated the stay previously entered by it. (Pet. App. 26a). In so doing, the court found that Shutts & Bowen's requested relief thereby had become moot. *Id.* Thereafter, on August 31, 1989 appeals were taken to the circuit court, and the United States filed with that court its emergency motion to stay the district court's order. (J.A. 22). The circuit court granted this motion on September 8, 1989. (J.A. 23).

The circuit court affirmed the district court's opinion on September 18, 1990, but did not rule on the issues presented by Shutts & Bowen, presumably because, as had the district court, the circuit court found that issue moot. (Pet. App. 1a-16a).

Before this Court only the debtors moved for a stay of the circuit court's order, but that motion was denied by Justice Kennedy, thus finally enabling the trustee to pay

respondent's then three year old fee and cost award. No. A-546 (January 22, 1991).

SUMMARY OF THE ARGUMENT

Because the premise of Shutts & Bowen's original motion to intervene has become moot, in that respondent's fees have been paid, this Court could well decline to consider the merits of Shutts & Bowen's arguments. Respondent, however, feels constrained to file this brief for two reasons. First, respondent does not want its silence here to somehow be deemed a waiver of its position should this Court reverse the circuit court's decision, and the government thereafter attempt to seek recoupment of the fees and costs awarded to Shutts & Bowen. Second, and more to the point, by letter dated February 4, 1991, the government has already indicated that it would likely seek the return of the funds received by respondent should this Court reverse the circuit court's decision. Shutts & Bowen's App. A.

As a result of this latter event, it is submitted that this Court should consider the applicability of the common-fund doctrine to the present situation. Respondent, through its prosecution and defense of numerous claims by and against the liquidating trustee, has both added to and preserved millions of dollars of the trustee's assets. It is both unreasonable and inequitable to allow creditors of the trust, including the government, to have access to those funds to satisfy their claims without first assuring that respondent has been paid for its efforts out of the

funds preserved and collected by respondent. This concept has been approved by this Court in the context of a class action recovery in the *Boeing Co. v. Van Gemert*, *supra*, decision, as well as by other courts in the context of bankruptcy and bankruptcy type proceedings. *In re Nucorp Energy, Inc.*, 764 F.2d 655 (9th Cir. 1985); *Abrams v. United States*, 274 F.2d 8 (8th Cir. 1960); *City of New York v. Rassner*, 127 F.2d 703 (2nd Cir. 1942); *In re S.T. Foods, Inc.*, 202 F.Supp. 37 (S.D. N.Y. 1962).

ARGUMENT

I. ASSUMING THAT THIS COURT REVERSES THE LOWER COURT'S DECISION, THE COMMON-FUND DOCTRINE IS APPLICABLE SO AS TO ALLOW AN EQUITABLE LIEN IN FAVOR OF SPECIAL COUNSEL TO THE TRUSTEE AGAINST THE FUND PRESERVED AND CREATED BY SAID COUNSEL PRIOR TO THE GOVERNMENT'S CLAIM FOR TAXES.

It is well established that bankruptcy courts are courts of equity, and thus are given fairly broad powers to insure that inequity or unfairness is not done in the administration of a matter. *Pepper v. Litton*, 308 U.S. 295 (1939); *In re Multiponics, Inc.*, 622 F.2d 709 (5th Cir. 1980). In quoting from *Pepper v. Litton*, *supra*, the *Multiponics* court stated,

> "The bankruptcy court has the equitable power and the duty 'to sift the circumstances surrounding any claim to see that injustice or infairness [sic] is not done in administration of the bankruptcy estate.' "

In re Multiponics, *supra*, at 714.

Pursuant to the terms of the plan of reorganization, the trustee was required to establish a fund in an amount reasonably necessary to pay the debtors' anticipated liability on any "disputed claims." (J.A. 48) Insofar as the instant proceedings are concerned, all litigation being handled by Shutts & Bowen involved the resolution of claims that were "disputed", and thus, subject to the plan's "reserve fund" requirement. Thus, even if the entirety of the government's claim be deemed an administrative expense and on the same level as that of Shutts & Bowen, it is respectfully submitted that, as a matter of law, Shutts & Bowen is entitled to be paid its fee in full as an equitable charge against the fund it preserved and created before any payment to the government out of that fund. *In re S.T. Foods, Inc., supra.*

In *In re S.T. Foods, Inc., supra,* the court was confronted with a situation strikingly similar to the case at bar. The government asserted, as an administrative expense, a claim for federal income and social security taxes withheld by the debtor in possession. The trustee, however, asserted that he should be paid first for all costs incurred, including attorneys' fees, which directly resulted in *creating* or *preserving* the trust.[2] In holding that the expenses claimed by the trustee were an equitable lien on the fund itself, and thus payable before the government's administrative expense claim, the court stated,

> "However, if the trustee can show that he incurred costs and expenses, including attorneys fees, which directly resulted in creating or

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[2] This claim was distinguished from his claim for the costs and expenses of general administration.

> preserving a trust fund which is not part of the assets of the estate and thus conferred a benefit on the party entitled thereto . . . [s]uch costs and expenses may under appropriate circumstances be an equitable charge on the fund in the trustee's hands. Such an equitable charge may be recognized and enforced by the bankruptcy court which has the fund under its control . . . '[I]t is well settled that bankruptcy proceedings themselves are purely equitable in their character . . . . ' It is true that these equitable powers must be exercised within the limits laid down by the Bankruptcy Act . . . . But this is not to say that the bankruptcy court in the exercise of its equitable powers may not allow a charge which in equity and good conscience should be made against a fund in the hands of one of its officers and under its control."

In re S.T. Foods. Inc., supra, at 40, 41.

In the case at bar the confirmed Plan of reorganization provided for the payment of administrative expenses such as respondent's fees and costs (Class I), and also provided that all mechanic's lienors (Class IV) and general unsecured creditors (Class VI) would be paid in full either upon implementation of the Plan, or when the claim was resolved. (J.A. 45-47) In fact, of the disputed claims handled by respondent on behalf of the trustee, all mechanic's lienors (except for one claim that is still pending in the Florida appellate courts) and all unsecured creditors have received payment to the extent that their claim was allowed. Thus, we are now confronted with a situation where millions of dollars have been paid by the trust to hundreds of creditors who are *junior* in priority to Shutts & Bowen.

The irony here, of course, is that but for the government's claim, there apparently would not be the spector of a deficiency in the trust; and, but for the efforts of Shutts & Bowen, the government and other creditors of a lower class would not have access to an additional $3 million to $6 million from the disputed claim fund to satisfy their claims. It is precisely this irony that was addressed by the *In re S.T. Foods, Inc., supra,* court in reaching its decision.

> "If the trustee is to be denied reimbursement of costs and expenses necessarily incurred in creating or preserving funds in his hands, even though payable to others, he may be discouraged from taking steps necessary for their creation or preservation to the substantial loss and damage of the ultimate beneficiaries of the funds. On the other hand, if the trustee does not receive such reimbursement substantial benefits may gratuitously accrue to the beneficiary which it would not otherwise have received or been entitled to."

In re S.T. Foods. Inc., supra, at 41. (*See also: City of New York v. Rassner, supra,* and the discussion found in *In re S.T. Foods, Inc., supra,* concerning what occurred in *Rassner, supra,* on remand.)

This concept is not unique to bankruptcy, but has been applied by other courts when considering the issue of an attorney's entitlement to receive compensation from funds created or preserved by the attorney, but ultimately payable to others. The court in *Abrams v. United States, supra,* was asked to construe the effect of the absolute priority granted to the government under Section 3466,

Revised Statutes, 31 U.S.C., Section 191,[3] as it related to attorneys' fees incurred by an assignor under a general assignment for the benefit of the assignor's creditors. In holding that the payment of these attorneys' fees was appropriate in spite of the government's Section 3466 objection, the court stated,

> "The rationale of these holdings was said to be '. . . the equitable principle that he who shares in a benefit should contribute a like share to the expenses incurred in realizing the benefit' . . . . Admittedly, the above noted decisions construed an act differing greatly in language and purpose from § 3466. However, they are nonetheless persuasive in setting forth what we believe to be a sound general rule That is, that creditors must bear the expense of proceedings taken in their favor and that such expenses may include services of the attorney for the debtor if performed in furtherance of the insolvency remedy . . . In conclusion then, we believe that no construction of § 3466 is tenable which would allow the government's claim to take precedence over the amount paid here to the assignor's attorney in connection with the proceedings and entirely for the benefit of creditors."

Abrams v. United States, supra, at 13.

A similar situation is present here. Plainly, the government will benefit greatly from Shutts & Bowen's efforts should this Court reverse the circuit court's opinion. That is to say, if respondent (or anyone else for that

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[3] This section has since been renumbered as 31 U.S.C. Section 3713 and is cited by the debtors in their brief.

matter) had done nothing, there would not be some \$3,000,000 to \$6,000,000 in the fund originally set aside for disputed claims for the government to look to to satisfy its claim. It is not only illogical, but also inequitable to say that the attorneys who preserved and added to this fund now should be compelled to return their fees and cost award so that said award can be distributed to others.

Respondent's request is not unlike the situation presented in *In re Nucorp Energy, Inc., supra,* at 661 where the court stated,

> "Under what has become known as the 'fund' doctrine, fees and costs are awarded to an attorney for his efforts in creating, preserving, or protecting a fund or property for the benefit of the class whom he represents. The fees are paid out of the fund itself because the attorney's efforts in creating or preserving the fund have benefited others who, absent this form of compensation, 'would unfairly enjoy the benefit without having shared the cost of acquiring the benefit.' "

Nor is it unlike the situation involving an award of attorneys' fees in a class action recovery, presented to this Court in *Boeing Co. v. Van Gemert, supra,* at 478, wherein it was held,

> "The common-fund doctrine reflects the traditional practices in courts of equity . . . The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense . . . Jurisdiction over the fund involved in the litigation allows a

court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit."

A similar holding need be made in the case at bar. The equitable principles enunciated by the above courts are equally applicable here. Under the common-fund doctrine respondent is entitled to its fees and costs out of the fund created and preserved by it prior to any payment to other creditors including the government.

CONCLUSION

For the foregoing reasons Shutts & Bowen respectfully requests this Court find that Shutts & Bowen has an equitable lien on the fund it created and preserved, and that even if the government's claim is upheld, that the Court provide that Shutts & Bowen be entitled to payment prior to the government out of the fund respondent created and preserved.

Respectfully submitted,

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BY: /s/ Barbara E. Vicevich
Barbara E. Vicevich

Nos. 90-1361, 90-1484

In The

Supreme Court of the United States

October Term, 1991

HOLYWELL CORPORATION, et al.,

Petitioners,

v.

FRED STANTON SMITH, LIQUIDATING TRUSTEE, et al.,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

FRED STANTON SMITH, LIQUIDATING TRUSTEE HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, THEODORE B. GOULD, and THE BANK OF NEW YORK,

Respondents.

APPENDIX TO THE BRIEF OF RESPONDENT SHUTTS & BOWEN

APPENDIX

APPENDIX A

U.S. Department of Justice

Tax Division

PLEASE REPLY TO: P.O. Box 14198
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February 4, 1991

CERTIFIED MAIL

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Re: In re Holywell Corp., et al., debtors Cases No. 84-01590/91/92/93/94 (Bankr. S.D. Fla.)

Dear Ms. Vicevich:

The United States and Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust, have been involved in litigation with respect to the payment of certain federal income taxes. The Trustee has prevailed in his argument that he was not required to file certain federal tax returns and pay the taxes due on those returns. See *Smith v. United States* (*In re Holywell Corp.*), 911 F.2d 1539 (11th Cir. 1990). The appellate process, however, has not been finalized since both the United States and the debtors have until March 21, 1991, to file a petition for a writ of certiorari with the United States Supreme Court.

At a hearing held on January 31, 1991, United States Bankruptcy Judge Sidney M. Weaver granted the Trustee's Motion for Order Requiring the Liquidating Trustee to Pay Claims. We are informed that Shutts & Bowen has a claim which the Trustee intends to pay pursuant to this order. Please be advised that the United States intends to file a notice of appeal to the United States District Court for the Southern District of Florida from Judge Weaver's order once it is entered.

Also, please be advised that, should the Supreme Court reverse the decision of the Eleventh Circuit, the United States would likely seek the return of funds distributed to the claimants for redistribution consistent with the trustee's responsibility for paying federal taxes.

If you have any questions, please contact trial attorney José Francisco de León of my staff at (202) 514-5040.

Sincerely yours,

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[illegible] 1991

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[illegible] of the United [illegible]

OCTOBER TERM, 1991

HOLYWELL CORPORATION, *et al.*,

Petitioners,

v.

FRED STANTON SMITH, *et al.*,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

FRED STANTON SMITH, *et al.*,

Respondents.

On Writs Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR RESPONDENT THE BANK OF NEW YORK

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QUESTION PRESENTED

Whether the trustee of a liquidating trust, created solely to implement a confirmed plan of bankruptcy reorganization, is statutorily required to assume the post-confirmation tax responsibilities of the reorganized debtors.

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In The

Supreme Court of the United States

October Term, 1991

Nos. 90-1361 and 90-1484

Holywell Corporation, *et al.*,
Petitioners,
v.
Fred Stanton Smith, *et al.*,
Respondents.

United States Of America,
Petitioner,
v.
Fred Stanton Smith, *et al.*,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF FOR RESPONDENT THE BANK OF NEW YORK

STATEMENT

1. The petitioners in No. 90-1361 are Theodore B. Gould ("Gould"); his wholly-owned corporation, Holywell Corpo-

ration ("Holywell"), and its subsidiary, Miami Center Corporation ("MCC"); and two partnerships that he likewise controls, Miami Center Limited Partnership ("MCLP") and Chopin Associates ("Chopin"). MCLP developed a real estate project in Florida called Miami Center, with financing from respondent The Bank of New York ("the Bank"). Pet. App. 2a.[1] Approximately 75% of MCLP was owned by Gould, Holywell and MCC. The balance of MCLP was owned by unrelated investors not involved in this proceeding. Chopin owned the land on which Miami Center was built (J.A. 35).

The business operations of Gould and his related entities were not limited to Miami Center. In 1984, Holywell had (besides debtor MCC) 19 other subsidiary corporations with which it filed a consolidated federal income tax return. These corporations were variously engaged in architectural and security services, engineering, equipment leasing, insurance, construction, hotel management, and building maintenance. Gould also was, alone or with Holywell, a partner in at least nine other partnerships with interests in real estate apart from Miami Center.[2]

2. On August 22, 1984, following default on the Bank's Miami Center loan, Gould, Holywell, MCC, MCLP, and Chopin (collectively, "the debtors") filed voluntary petitions under chapter 11 of the Bankruptcy Code.[3] Only these four

[1] References to "Pet. App." are to the appendix to the petition for certiorari in No. 90-1361; references to "Bank App." are to the appendix attached to the Bank's brief in opposition; references to "J.A." are to the Joint Appendix filed with this Court; and references to "Bankr. C.P." are to the docketed court paper numbers in the bankruptcy court. A list of entities related to the Bank appears on page ii of its brief in opposition. *See* Sup. Ct. R. 29.1.

[2] *See* Bankr. C.P. 275-278. A schedule listing the various Gould entities not involved in this bankruptcy proceeding is attached as Appendix A.

[3] Unless otherwise noted, all references to the Bankruptcy Code

Gould-controlled entities filed petitions. Holywell's other 19 subsidiaries, as well as the other partnerships and joint ventures in which Gould and Holywell owned interests, continued to operate outside bankruptcy under Gould's direction.

No trustee was appointed to operate the business of any of the five debtors. Rather, each debtor served as representative of its own estate as "debtor in possession" under BC § 1107. In December 1984 and January 1985, certain properties ("the Washington properties") were sold by non-debtor entities in which Gould and Holywell owned interests. The proceeds of that sale were held pursuant to bankruptcy court order.[4]

3. In early 1985, the Bank proposed a consolidated plan of reorganization ("the plan") and the debtors proposed competing plans. The Bank's plan was overwhelmingly approved by the creditors and confirmed by the bankruptcy court. The plan stipulated the prompt sale of Miami Center to the Bank on previously agreed terms. The cash proceeds of that sale, along with proceeds of the Washington properties and recoveries from certain causes of action, were to be distributed in satisfaction of creditors' allowed claims, as detailed in the plan. J.A. 39, 41. The residue remaining after payment of such claims was to be returned to the discharged debtors (J.A. 47), who meantime remained in control of their records and operations.

The plan provided that distributions to creditors would be made through a specially-appointed "liquidating trustee." The liquidating trustee had various administrative powers over property subject to the plan, but he was forbidden to take any action that would change the debt-

("BC") are to 11 U.S.C. § 101 *et seq.*, as in effect during the years at issue; and all references to the Internal Revenue Code ("IRC") are to 26 U.S.C. § 1 *et seq.*, as in effect during the years at issue.

[4] Bankr. C.P. 303. The Government's brief mistakenly states that the Washington properties were owned by Holywell (U.S. Br. 3).

ors' business. J.A. 41-43. He was given access to the debtors' records only for the limited purposes of carrying out the sale of Miami Center and of verifying, or objecting to, claims of creditors. J.A. 50. He had no access to the financial records of Holywell's non-debtor subsidiaries, and he had no role whatever in running the debtors' business.

Following the expiry of a stay obtained by the debtors, the confirmed plan became effective on October 10, 1985 (Pet. App. 30a). Respondent Smith, whose appointment as liquidating trustee became effective upon confirmation, thereupon became authorized to implement the plan. He closed the sale of Miami Center the same day.[5] Within 120 days thereafter, he had made distributions in full satisfaction of 90% of creditors' claims, including a distribution to the IRS of approximately $2.3 million (Bankr. C.P. 1254).

Had matters proceeded as expected, the balance of creditors' claims would have been paid in early 1986 and the residue of the assets promptly returned to the debtors. Instead, Gould commenced new lawsuits and appeals—more than 60 of them—in a effort to stop implementation of the plan.[6] While these actions have achieved little success on the merits, they have prevented the plan from being effected on schedule, and have caused the liquidating trust to remain in existence years longer than anticipated.

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[5] In return for the conveyance of Miami Center, the Bank released the debtors from liability on a judgment in its favor of $234 million, paid more than $11 million in cash, and released $30 million of cash collateral generated by sale of the Washington properties. *In re Holywell Corp.*, 901 F.2d 931, 932 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 713 (1991). The Bank subsequently disposed of Miami Center at a loss of more than $70 million.

[6] In pursuit of such appeals, the debtors have filed ten petitions for certiorari in this Court alone, the first nine of which were denied. *See* Docket Nos. 87-1988, 87-1989, 88-80, 89-864, 89-708, 89-917, 90-676, 90-761 & 90-1551.

4. The plan did not provide for the liquidating trustee to assume any of the debtors' post-confirmation tax filing or payment responsibilities. The IRS was given copies of the proposed plans and disclosure statements and notice of the hearing on confirmation. It did not appear at the hearing or object to confirmation of the Bank's plan.

For two years after confirmation, the debtors took the position that they and not the liquidating trustee were responsible for filing federal income tax returns and paying any taxes due. Gould's accountants (J.A. 159) and his chief financial officer (J.A. 162) advised him that the liquidating trust was not a separate taxable entity, and that the discharged debtors should include on their own returns any income that the trustee received. In March 1987, Gould advised counsel for the trustee that interest income received on the trust's accounts for 1985 "has been reported as taxable income for 1985" by Holywell and the other debtors to which it was allocable. Gould similarly advised that "the interest income for 1986 will be reported separately" by each debtor. J.A. 161.[7]

Consistent with that position, Gould caused the filing, after confirmation, of a consolidated return for Holywell, MCC, and Holywell's 19 non-debtor subsidiaries for the tax years ending July 31, 1984 and July 31, 1985. On the latter return, he reported capital gain derived from sale of the Washington properties (J.A. 98; Pet. App. 3a). Gould also caused the post-confirmation filing of debtor MCLP's return for 1985, to which were attached IRS Forms K-1 showing the effects of the sale of Miami Center on the partners, including himself and Holywell. *See* Appellant Gould's Response, Exh. L & M (Nov. 22, 1989) (J.A. 24).

Throughout the post-confirmation period, Gould has controlled the information necessary to calculate his own tax

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[7] Although these discussions explicitly referred only to the interest income received by the trustee, there was no suggestion that gain or loss from the real estate sales should be treated differently.

liabilities and those of the reorganized corporations.[8] Moreover, Gould has vigorously resisted all efforts of the liquidating trustee to review financial records that would be necessary to prepare the tax returns at issue.[9] Respondent Smith has had no access to records of the 19 non-debtor subsidiaries with which Holywell has filed consolidated tax returns; no access to records of Gould's and Holywell's other non-debtor affiliates; and no access to records of the reorganized debtors' own post-confirmation activities.

Not until two years after the plan was confirmed did Gould take the position that the liquidating trustee should be filing returns and paying taxes for the reorganized debtors. To resolve the issue, respondent Smith initiated the adversary proceeding that has brought the case to this Court. The opinions of the three courts below holding that the liquidating trustee is not required to assume the debtors' post-confirmation tax responsibilities are described in respondent Smith's brief, and that description is not repeated here.

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[8] The liquidating trustee furnished Gould with monthly reports concerning income and expenses of the trust. *See, e.g.*, Appellant Gould's Response, Exh. N (Nov. 22, 1989) (J.A. 24). Gould likewise received original copies of IRS Forms 1099 reporting interest income paid by banks on the trust's investments.

[9] Gould and his entities have tenaciously resisted respondent Smith's efforts to obtain information even about matters indisputably within his authority, not to mention about the debtors' independent post-confirmation business or that of the 19 Holywell subsidiaries that never filed for bankruptcy. The district court, in fact, has recently reversed a bankruptcy court order requiring production of financial and other records of the non-debtor subsidiaries, in part on the ground that it was not established that the liquidating trustee had a claim for their assets. *Holywell Corp. v. Smith*, 118 B.R. 876 (S.D. Fla. 1990). In that opinion, the court specifically noted that the debtors had refused not only to produce information concerning the financial affairs of their wholly-owned subsidiaries, but also to produce records of their own post-confirmation financial transactions despite various orders compelling them to do so (118 B.R. at 876).

SUMMARY OF ARGUMENT

I. This case requires the Court to decide who bears the tax responsibilities for a reorganized debtor after confirmation of a chapter 11 plan. The instant plan created a post-confirmation liquidating trust which was to disburse funds to creditors and return the residue to Gould and his corporations. Petitioners conceded at trial that the trust itself is not separately taxable. The question, therefore, is who must file post-confirmation returns for Gould and his corporations after they have emerged from chapter 11 and resumed normal economic activity.

By interpreting the plan to require that the reorganized debtors take charge of these responsibilities, the courts below accurately reflected the parties' own expectations and their behavior at the relevant time. For more than two years following confirmation, the debtors insisted that they, not the liquidating trustee, should report on their own returns the income stemming from trust transactions. This scenario is hardly unusual under our tax law. Taxpayers are commonly required to report income attributable to transactions by entities in which they have an interest; to aggregate such income with their independent items of income and loss; and to pay the resulting tax out of their own separate funds. Indeed, the debtors themselves filed several post-confirmation returns before claiming that this duty was the liquidating trustee's.

It is axiomatic that a taxpayer's income must all appear on a single return; it cannot be split among several returns. *North American Oil Consolidated v. Burnet*, 286 U.S. 417, 423 (1932). Thus, if the trustee must file post-confirmation returns for the reorganized corporations, those returns could not be limited to items of interest and gain or loss originating from the trust. Rather, such returns would also have to include the income, deductions, and losses resulting from the separate post-confirmation activities of the reorganized corporations, the 19 non-debtor

subsidiaries with which Holywell files consolidated returns, and the various other ventures in which Holywell participates.

Requiring the liquidating trustee to file such returns would be both impractical and unfair. Respondent Smith has no control over the reorganized debtors, no knowledge of their post-confirmation activities, and no access to their financial records. He has had no role in operating the debtors' business, either before or after confirmation of the plan. It is not surprising that Gould finds attractive the prospect of the liquidating trust—in effect, his old creditors—paying the taxes of his reorganized corporations for so long as he, by vigorous litigation, can keep the trust from finishing its mission. But this outcome is scarcely compatible with sound administration of the tax and bankrupcty laws.

II. Petitioners do not challenge the lower courts' construction of the plan's terms. Rather, they contend that the reorganized debtors' tax obligations were shifted to the liquidating trustee solely by operation of law. None of the statutory bases on which they rely supports this contention.

A. Section 6012(b)(4) of the Internal Revenue Code provides that "[r]eturns of * * * a trust [or] an estate of an individual under chapter 7 or 11 of title 11" shall be filed "by the fiduciary thereof." This section applies only if respondent Smith is "the fiduciary" of a separate taxable entity—an individual "bankruptcy estate" or a "trust." As debtor in possession, however, Gould was "the fiduciary" of his own bankruptcy estate. And by the time the liquidating trust came into being, Gould's bankruptcy estate had ceased to exist, with the logical corollary that respondent Smith can never have been "the fiduciary" of that estate.

The debtors' argument, not joined by the Government, that the liquidating trustee is "the fiduciary" of a

separate taxable "trust" created in part for Gould's benefit is belied by their concession below that the trust is not separately taxable. That concession was correct. As an entity created to pay creditors' claims and return the residue to the debtors, the liquidating trust is, as the bankruptcy and district courts correctly held, a "grantor trust," whose income must appear directly on the debtors' own returns.

B. Section 6012(b)(3) applies "[i]n a case where a receiver, trustee in a case under title 11 * * * or assignee * * * has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated." It requires such a fiduciary to "make the return of income for such corporation in the same manner and form as corporations are required to make such returns." This provision does not apply here.

1. The liquidating trustee is not "a trustee in a case under title 11." Congress specifically stated its intention to conform the terminology of section 6012(b)(3) to that of the Bankruptcy Code. H.R. Rep. 833, 96th Cong., 2d Sess. 47-48 (1980). Under the Bankruptcy Code, "trustee in the case" is a term of art denoting the trustee appointed by a bankruptcy court to take charge of the debtor's estate and manage its business prior to confirmation of the plan (BC § 1104(a)). The liquidating trustee was concededly not so appointed.

Nor is the liquidating trustee a "receiver" or "assignee" within the meaning of section 6012(b)(3). These terms refer to persons who, outside the federal bankruptcy context, play a role similar to that of a "trustee in a case under title 11." In every instance where a fiduciary has been required to file corporate returns as a "receiver" or "assignee," that fiduciary was either (1) acting as a surrogate for an insolvent corporation with plenary powers to run its business, or (2) carrying out the process of

liquidating or dissolving the corporation. Receivers and assignees are fiduciaries *for the corporation* who act in the place of corporate management. By contrast, the liquidating trustee here was appointed to disburse specified assets to creditors while the reorganized corporations and their management continue to carry on business.

2. The statute's history confirms that it applies only where a fiduciary acts as a corporation's substitute or "alter ego" with plenary power to manage its affairs. Referring to the original version of what is now section 6012(b)(3), this Court pointed out that "[t]he language of the section contemplates a *substitution* of the receiver for the corporation." *North American Oil Consolidated v. Burnet, supra*, 286 U.S. at 422-423 (emphasis added). Regulations interpreting the same provision explained that a "receiver, trustee, or assignee" having custody of corporate assets "*stands in the place of the corporate officers* and is required to perform all the duties and assume all the liabilities which would devolve upon [them] were they in control." Regulations 33, Art. 209 (1918) (emphasis added). And regulations issued in 1919 on the subject of corporate liquidation similarly recognized that receivers or trustees in dissolution "stand in the stead of the corporation" for the purpose of liquidating its assets and paying its debts. Regulations 45, Art. 547 (1919). Nothing in the later history of the statute has changed this basic requirement.

In sum, section 6012(b)(3) and its predecessors have only been applied to fiduciaries, however denominated, who step into the shoes of corporate management and discharge all the duties that the corporate officers would otherwise perform—including the filing of tax returns. Respondent Smith does not represent the reorganized corporations and he in no sense "stands in the shoes" of their managers. He thus has no duty to file their tax returns.

III. Asserting that Gould and his corporations "evidently lack funds to satisfy the very substantial tax liabilities at issue" (U.S. Br. 13), the Government contends that those taxes will never be collected if the liquidating trustee does not file returns and pay them. This contention lacks any factual predicate in the record and in any event would not justify the result the Government seeks.

There is no record support for either of the Government's assertions—that Gould and his corporations owe a substantial tax or that they cannot pay from their own funds whatever tax they may owe. And even if practical collection problems had been shown to exist as to the particular debtors here, that would not be a reason to embrace the Government's anomalous statutory argument, which would apply perforce to all chapter 11 reorganizations.

The problem of which the Government complains, if real, is one of its own making. The IRS received notice of all proceedings in bankruptcy court, and standard IRS procedures require its personnel to review all proposed reorganization plans. The Service thus had ample opportunity to object and be heard on the terms of the plan and to appeal from the order of confirmation. Had it taken advantage of those practical opportunities, the IRS could have established in a concrete, fact-based context—and ultimately avoided—the collection problems it now urges on this Court.

Having failed to exercise the requisite diligence in bankruptcy court, the IRS now advances a strained statutory argument in an effort to collect the debtors' taxes from funds that the plan of reorganization explicitly reserves for *other creditors*. If this mode of collection is permitted, it will have extremely unsettling effects on the bankruptcy process. That process is one of negotiation and compromise; the IRS should not be permitted to absent itself from the negotiating table and then demand a form of

"super-priority" payment after the plan has been confirmed. Creditors' votes to confirm a plan are premised on the belief that it provides a fixed sum of money to meet their claims. If the IRS can sit on its hands and raid the pot after their votes are cast, bankruptcy reorganizations will be neither predictable nor just.

ARGUMENT

THE LIQUIDATING TRUSTEE IS NOT REQUIRED BY STATUTE TO ASSUME THE POST-CONFIRMATION TAX RESPONSIBILITIES OF THE REORGANIZED DEBTORS

This case requires the Court again to address the sometimes uneasy relationship between the bankruptcy and tax laws. Congress has often recognized that "the development of tax rules for bankruptcy and insolvency can involve accommodation of tax policy and bankruptcy concerns." 126 Cong. Rec. 34106 (1980) (Rep. Ullman). This case requires application of that principle in the context of deciding who bears the tax responsibilities for a discharged debtor following the confirmation of a reorganization plan in a chapter 11 proceeding.

The tax responsibilities at issue are those of the reorganized debtors—Gould and his entities—and not those of the liquidating trust. Petitioners conceded below that the trust is not a taxable entity obligated to file returns or pay tax on its own behalf. Rather, the taxpayers whose liabilities are at stake are Gould and the other reorganized debtors. It is undisputed that tax returns must be filed for them and that any taxes due must be paid. The only question is who is required to take care of these tax obligations during the period *after* the plan of reorganization is confirmed, when Gould and his entities emerge from chapter 11 and resume normal economic activity.

Three courts below have held that the reorganized debtors, following their discharge from bankruptcy, have the duty to file their own income tax returns and pay whatever

taxes they may owe. In seeking to overturn that result, the Government urges an inflexible rule whereby these tax obligations, as a matter of statutory compulsion, would be shifted from the discharged debtors to the liquidating trust for as many years as the trust remains in existence. As we shall show, the Government's position is at odds with general tax and bankruptcy principles and derives no support from the statutory provisions on which it relies. The Government's position, moreover, would lead to impractical and unfair results, for it would enable a successfully reorganized corporation in effect to transfer to its former creditors its post-bankruptcy tax liabilities.

I. The Court Of Appeals Properly Interpreted The Plan Of Reorganization To Make The Reorganized Debtors Responsible For Their Post-Confirmation Tax Obligations

A. Under General Tax And Bankruptcy Principles, A Discharged Debtor Is Responsible For Tax Duties That Arise After Confirmation

This Court has stressed that, in considering the interplay of the tax and the bankruptcy laws, it is essential to have in mind the "relevant periods to be considered." *Nicholas v. United States*, 384 U.S. 678, 686 (1966). Here, the period at issue is the period *after* confirmation of the plan for the debtors' reorganization under chapter 11 of the Bankruptcy Code.[10]

Confirmation of a chapter 11 plan represents the conclusion of the bankruptcy process for those debtors who,

[10] The plan was confirmed on August 8, 1985, with an effective date of October 10, 1985 (Pet. App. 30a). Holywell's tax return for its fiscal year ending July 31, 1985—the year during which the Washington properties were sold—was due (absent extensions) on October 15, 1985, five days after confirmation became effective. Holywell's tax return for its fiscal year ending July 31, 1986—the year during which Miami Center was sold—was due more than a year after confirmation.

like Gould and his entities, invoke that process successfully. Confirmation terminates the bankruptcy estate and revests in the reorganized debtor any assets not needed to pay creditors' claims (BC § 1141(b)). Upon discharge, the debtor resumes normal business activities relieved of the burden of most pre-confirmation debts (BC § 1141(d)(1)(A)). Indeed, if a debtor whose pre-confirmation assets are liquidated under a chapter 11 plan does not continue in business, confirmation of the plan does not operate as a discharge (BC § 1141(d)(3)).

Besides discharging the debtor, confirmation implements a program of payments to creditors from the former debtor's assets (BC § 1123(a)(5)). Once the plan has been confirmed, this distribution program proceeds in tandem with the debtor's resumption of normal economic activity. The Bankruptcy Code expressly allows the distribution process to be effected through entities specially created for that purpose, such as the liquidating trust here (BC §§ 1123(a)(5)(B), 1142(a)). These entities often remain in existence for many years after confirmation.[11] Indeed, it is not unusual under a chapter 11 plan for a debtor to have continuing obligations to make contributions toward payment of its former creditors. *See* 5 Collier *Bankruptcy Practice Guide* ¶ 90.06[4] (1991).

These normal consequences of a chapter 11 confirmation occurred here. When the plan was confirmed, Gould and his corporations resumed business activities free of bankruptcy-imposed constraints. At the same time, a mechanism was established, in the form of the liquidating trust, to make payments to creditors from the debtors' prior assets, with the residue being returned to the debtors once the distribution process was complete.

[11] *See, e.g., United States v. Energy Resources Co.*, 110 S.Ct. 2139, 2141 (1990) (special trust created to pay off debts during five-year period after confirmation). *Cf. In re A.H. Robins Co.*, 880 F.2d 769, 771 (4th Cir. 1989) (confirmed plan of reorganization created $2.3 billion trust to pay Dalkon Shield claims over period of years); *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 640 (2d Cir. 1988) (confirmed plan of reorganization created trust to satisfy debtor's ongoing asbestos-related liabilities).

In the typical chapter 11 case, there can be no question that with the benefits of conducting business free of old debts necessarily go the normal burdens that in our society accompany economic activity, including liability for income taxes. Post-confirmation tax obligations are the responsibility of the discharged debtor. *United States v. Redmond*, 36 B.R. 932, 934 (D. Kan. 1984); *Matter of Patch Press, Inc.*, 71 B.R. 345, 347-348 (Bankr. W.D. Wisc. 1987); *In re Gyulafia*, 65 B.R. 913, 916-917 (Bankr. D. Kan. 1986); *In re Hirsch-Franklin Enterprises, Inc.*, 63 B.R. 864, 871-872 (Bankr. M.D. Ga. 1986); Rev. Rul. 69-641, 1969-2 C.B. 241 (receivership).

B. The Courts Below Properly Determined That The Plan Approved In This Case Comports With This General Rule

The courts below correctly interpreted the plan to require that post-confirmation responsibilities for filing the reorganized debtors' tax returns and paying any tax due should rest where tax responsibilities usually rest—with the taxpayers, not some third party. The plan contains no express provision concerning the tax duties at issue, and the court of appeals determined that no provision of the plan "can reasonably be interpreted as requiring the liquidating trustee to file income tax returns and pay income taxes" (Pet. App. 7a). Petitioners do not challenge this construction of the plan's terms, contending that the reorganized debtors' tax obligations were shifted to the liquidating trustee solely by operation of law.

By interpreting the plan to require that the reorganized debtors take charge of their own tax responsibilities, the courts below accurately reflected the parties' own expectations and their behavior at the relevant time. The plan

provided that Miami Center would be sold within 45 days of confirmation pursuant to a contract attached to the plan (J.A. 39); that the proceeds of that sale and of the earlier sale of the Washington properties would promptly be distributed to creditors as fixed in the plan (J.A. 40-41, 45-47); and that all remaining assets of the liquidating trust would then be returned to the reorganized debtors (J.A. 39, 47). This residue was expected to be substantial. It was to include stock owned by Holywell in 19 subsidiaries that had not filed for bankruptcy, as well as partnership and joint venture interests owned by Holywell and Gould individually. J.A. 30; Holywell Br. 2 n.1 & 4 n.5; App. A, *infra*. And it was to include the anticipated excess over creditors' claims of the sales proceeds and interest income received by the liquidating trust.[12]

At the time the plan was proposed and confirmed, there was every reason to believe that Gould and his entities, following their discharge, would be able to carry out the normal tax duties of any business operation.[13] The sale of Miami Center took place on the same day the plan was confirmed. Had the original expectation of a quick distribution not been frustrated by protracted litigation instigated by the debtors, the mandated payments to creditors would have been completed on schedule in a few months. The debtors would then have received back property having substantial value, including the property of Holywell with its business unchanged.[14] By the use of these assets and assets subsequently acquired, the reorganized debtors would have been in a position to pay any taxes that might have been due when income from the trust transactions was combined with items of income, deduction and loss realized by the debtors in their post-confirmation activities.

[12] The schedules filed by the debtors in September and December 1984 showed assets and equity well in excess of scheduled liabilities. *See* Bankr. C.P. 121, 275-278. The debtors' disclosure statements filed in connection with confirmation projected a residue in excess of $30 million. *See* Bankr. C.P. 377-381, 466-470.

[13] Contrary to the debtors' assertion (Holywell Br. 2-3), the proponents of the plan had no "secret intention" that the debtors' post-confirmation tax obligations should not be met. The proponents intended that those obligations would be met, but that the debtors themselves—who had control of the relevant tax records and complete knowledge of their post-confirmation affairs—would meet those obligations, not the creditors through the liquidating trust.

The debtors themselves evidently shared the expectation that they would be responsible for their own post-confirmation tax obligations. Gould was told by his tax advisers that he and his entities, and not the trust, should file the required post-confirmation tax returns (J.A. 159-60, 161, 163). Gould evidently has filed individual income tax returns throughout the period (J.A. 77, 99, 162). He caused the filing of returns for Miami Center Limited Partnership, one of the debtors in this proceeding; attached to one partnership return were IRS Forms K-1 showing the effects of the sale of Miami Center on the partners, including himself and Holywell. *See* page 5, *supra*. After confirmation of the plan, he filed a return for Holywell for the fiscal year ending July 31, 1984 (J.A. 98). And he filed belated returns for Holywell for the fiscal year ending July 31, 1985, both with the IRS and with Virginia tax authorities. Pet. App. 3a; Brief Amicus Curiae of California *et al.*, at 3 n.1.

In short, until long after the plan was confirmed, Gould and his entities gave every indication of understanding perfectly well that it was they who were responsible for filing their own post-confirmation returns. In 1986, Gould even objected to the liquidating trust's establishment of a reserve for potential federal income taxes on interest income, terming such a reserve "unwarranted" (J.A. 156, ¶ 11; *see also* J.A. 106). It was not until late in 1987 that Gould unexpectedly changed his tune.

[14] The plan forbids the liquidating trustee to change the business of any of the debtors (J.A. 43).

C. Shifting To The Liquidating Trustee Responsibility For The Debtors' Post-Confirmation Tax Duties Is Inconsistent With Basic Tax And Bankruptcy Principles And Is Unworkable In Practical Terms

The idea that after confirmation a reorganized chapter 11 debtor should carry on its business, not only relieved of prior debts, but with its future tax obligations shifted to its former creditors, would normally be dismissed as nonsensical, as well as grossly unfair. In seeking to make that idea plausible here, the Government emphasizes that the liquidating trustee made post-confirmation sales of realty formerly owned by the debtors and collected post-confirmation interest on funds held for distribution to creditors. These activities, as all parties agree, resulted in gross income to Gould and his entities. Since the trustee held the proceeds of these transactions, the Government asks, why shouldn't he file tax returns reporting the transactions and pay taxes on the income that the reorganized debtors were deemed to have received?

The short answer to this question is that Gould and his entities, following confirmation of the plan of reorganization, resumed a status indistinguishable from that of other taxpayers in our society. When chapter 11 works as it is supposed to, the discharged debtor moves on to new profit-seeking activity. With such activity go tax obligations, and those who have emerged from chapter 11 are no more immune from that principle than anyone else.[15]

Under the approach of the courts below, Gould and his corporations are required to prepare their own post-confirmation tax returns, reflecting on such returns both their own independent items of income and deduction and any trust activities that result in tax consequences for them. This scenario is hardly unusual under our tax law. Many taxpayers, besides earning wages and salary, have interests in trusts, estates, partnerships, and other entities that generate income tax consequences for them individually. As a result of transactions by such entities, taxpayers are often required to report income in amounts substantially larger than the cash distributions they currently receive.[16] Taxpayers, in short, are commonly required to report income attributable to transactions by entities in which they hold interests; to aggregate such income with their independent items of income and loss; and to pay the resulting tax out of their own separate funds.

Petitioners' proposal to shift these responsibilities to the liquidating trustee yields an abnormal and wholly impractical result. The liquidating trust is not separately taxable; the "taxpayers" are Gould and his reorganized corporations. It is axiomatic that a corporation's income must all appear on a single return; it cannot be split among several returns. *North American Oil Consolidated v. Burnet*, 286 U.S. 417, 423 (1932). Therefore, if the trustee must file post-confirmation returns for the reorganized corporations, those returns could not be limited to items of interest and gain or loss arising from the trust's transactions.

To the contrary: as the corporations proceed on their business enterprises, their new activities will necessarily

[15] The mere possession of sales proceeds and interest income belonging to the debtors, of course, is not sufficient to require the liquidating trustee to pay their taxes out of those sums. Apart from a few specialized contexts, there is no general "withholding requirement" for fiduciaries holding funds for others. *Cf.* IRC § 1445 (withholding of tax on disposition by foreign persons of U.S. real property interests); IRC § 3406 (back-up withholding on interest payments where taxpayer has failed to furnish identification number).

[16] For example, partners are taxed on their distributive share of partnership income regardless of their right to a current distribution. *See* IRC § 61(a)(13). A trust beneficiary is taxable on "income required to be distributed currently" under IRC §§ 652(a) and 662(a)(1), even though a legal dispute prevents actual payment. *See United States v. Higginson*, 238 F.2d 439 (1st Cir. 1956); Rev. Rul. 62-147, 1962-2 C.B. 151. Income from assets set aside in a "sinking fund" to retire indebtedness is taxable to the debtor even though the assets are controlled by a "trustee." Treas. Reg. § 1.61-13(b).

affect their tax situations. They will earn income, incur deductible expenses, buy and sell property, and realize gains and losses—all entirely independent of the liquidating trust. These separate activities must be reflected on their tax returns, whoever files them. Under petitioners' position, the liquidating trustee would be required to marshal information about the post-confirmation activities of Holywell and its 20 consolidated subsidiaries—a virtually impossible task given Gould's refusal to supply essential financial records. The trustee would also be required to pay *all* of the corporate debtors' taxes, not just the portion attributable to interest received by the trust and capital gain or loss realized on the Washington property and Miami Center sales.

Petitioners do not indicate when, if ever, the liquidating trustee would be free of the responsibility they would assign to him for taking care of the reorganized debtors' taxes. Presumably this duty would end when the trust terminates, but that date has been made highly uncertain by the actions of the discharged debtors themselves. Although intended to complete its work within a few months and return to the debtors substantial residual assets, the liquidating trust has now been in existence for six years, the delay being due chiefly to the debtors' litigiousness.

It is not surprising that Gould finds attractive the prospect of the liquidating trust—in effect, his old creditors—paying the taxes of his reorganized corporations for as long as he can, by vigorous litigation, keep the trust from finishing its mission. But this outcome is scarcely compatible with sound administration of the tax and bankruptcy laws. Petitioners urge a scenario under which a reorganized corporate debtor would embark on new businesses with its tax obligations shifted, for an indefinite period of time, to a liquidating trust with essentially fixed assets and prior obligations to other claimants. Because a liquidating trust may often have insufficient funds to satisfy a reorganized debtor's ongoing tax liabilities, it is by

no means clear that this outcome serves the Government's long-run interest. In any event, it is wholly inconsistent with basic tax principles, fundamental bankruptcy concepts, and common sense.

II. The Statutory Provisions On Which Petitioners Rely Do Not Require The Liquidating Trustee To Assume The Reorganized Debtors' Tax Duties

While acknowledging the general rule that reorganized debtors bear their own tax responsibilities, the Government in a particular case may have collection-based concerns that suggest the advisability of including special tax arrangements in the reorganization plan. We discuss below the various avenues that the IRS, a listed creditor in bankruptcy court, could have pursued had it wished to voice such concerns here. *See* pages 45-47, *infra*. Having failed to take advantage of these practical opportunities, the Government now advances a strained statutory argument—that the liquidating trustee, by operation of law, displaced the discharged debtors as the person legally responsible for filing their post-confirmation returns. This argument, if accepted, would shift the tax-filing duties in *all* bankruptcy reorganizations that employ trusts of this sort, even where collection of post-confirmation taxes from the debtors themselves is ensured.

For a rule so inflexible and so at odds with general tax and bankruptcy norms, the clearest statutory command should be required. The Government discerns such a mandate in section 6012(b) of the Internal Revenue Code, which covers "returns made by fiduciaries and receivers." The Government contends that section 6012(b)(4) requires the liquidating trustee to discharge the post-confirmation tax duties of Gould, the individual debtor; and that section 6012(b)(3) subjects the trustee to similar responsibilities on behalf of the corporate debtors. The debtors themselves, while not disavowing section 6012(b), place chief reliance on provisions of law outside the Internal Revenue Code.

As we shall show, none of the statutes on which petitioners rely furnishes the necessary justification.

A. Section 6012(b)(4) Of The Internal Revenue Code Does Not Require The Liquidating Trustee To Assume The Tax Duties Of The Reorganized Individual Debtor

Section 6012(b)(4) applies to "[r]eturns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code." It specifies that such returns are to be filed "by the fiduciary thereof." By its terms, section 6012(b)(4) can apply only where there exists a separate taxable entity—an estate, a trust, or an individual bankruptcy estate.

The Government and the debtors, while both relying on section 6012(b)(4), cannot agree on how it produces the result they desire. The Government contends that the liquidating trustee is the fiduciary of Gould's individual bankruptcy estate (U.S. Br. 31-36); the debtors contend that he is the fiduciary of a separate taxable trust (Holywell Br. 30). Neither contention is correct.

1. *The Liquidating Trustee Was Never "The Fiduciary" Of Gould's Bankruptcy Estate*

When Gould petitioned for relief under chapter 11, "an estate" was brought into being (BC § 541(a)). Under IRC § 1398, that estate was a separate taxable entity, distinct from Gould.[17] Since no trustee was appointed under BC § 1104, Gould was and remained, as the debtor in possession, "the fiduciary" of his own estate. Section 1107(a) of the Bankruptcy Code specifically provides, with exceptions not relevant here, that the debtor in possession "shall have all the rights * * * and powers, and shall perform all the functions and duties, * * * of a trustee serving in a case

[17] By contrast, no new tax entity was created when the corporate debtors filed their petitions (IRC § 1399).

under this chapter." *See CFTC v. Weintraub*, 471 U.S. 343, 355-356 (1985). Among Gould's duties as debtor in possession was the duty to file tax returns on behalf of his estate. *See* IRC § 1398(c)(1); BC §§ 323(a), 346(c)(2), 505(b), 1106(a)(6).[18]

When the plan of reorganization was confirmed, Gould's separate bankruptcy estate ceased to exist.[19] At that point,

[18] *See* Howard, *An Overview of the State and Federal Tax Responsibilities of Bankruptcy Trustees and Debtors*, 93 Comm. L.J. 43, 47 (1988) ("[W]here no trustee is appointed [in an individual chapter 11 case] the obligation to file returns is imposed on the debtor in possession."). The Government's brief wholly ignores Gould's status as debtor in possession; indeed, it seems to proceed on the erroneous assumption that a trustee is invariably appointed during the administrative phase of a chapter 11 case to operate the debtor's business. *See* U.S. Br. 33 ("When the debtor's property [is] transferred to the bankruptcy estate, the obligation to report and pay taxes * * * is placed on the trustee"); *id.* at 32 n.22 ("The trustee under chapter 7 or 11 who assumes the estate property reports income and pays taxes for the estate."). Contrary to the Government's apparent assumption, trustees under BC § 1104 are usually appointed only in cases of fraud, dishonesty, incompetence, or gross mismanagement by the debtor; the typical chapter 11 debtor serves as debtor in possession. *See* 5 L. King, *Collier on Bankruptcy* ¶ 1104.01 (15th ed. 1991) (citing cases).

[19] *E.g., In re Westholt Manufacturing, Inc.*, 20 B.R. 368 (Bankr. D. Kan. 1982), *aff'd sub nom., United States v. Redmond*, 36 B.R. 932 (D. Kan. 1984). Under BC § 1141(b), confirmation of the plan divests the estate of its assets, since "all of the property of the estate" then vests in the debtor "[e]xcept as otherwise provided in the plan or the order confirming the plan." The plan here vested "all property of the estate" in the liquidating trust with remainder to the debtors, and Gould's separate bankruptcy estate went out of existence. *See In re T.S.P. Industries*, 120 B.R. 107, 109 (Bankr. N.D. Ill. 1990); *In re W.R.M.J. Johnson Fruit Farm, Inc.*, 107 B.R. 18, 19 (Bankr. W.D.N.Y. 1989); *In re Grinsted*, 75 B.R. 2 (Bankr. D. Minn. 1985); *In re Natco Ind.*, 69 B.R. 418, 419 (S.D.N.Y. 1985); *Prince v. Clare*, 67 B.R. 270, 272 (N.D. Ill. 1986); *In re Balogun*, 56 B.R. 117, 118 (Bankr. M.D. Ala. 1985); *In re Barker Medical Co.*, 55 B.R. 435, 436 (Bankr. M.D. Ala. 1985); *In re Wood*, 47 B.R. 774, 777 (Bankr. W.D. Wisc. 1985); *Abbott v. Blackwelder Furniture Co.*, 33 B.R. 399 (W.D.N.C. 1983).

all of the estate's assets vested in the liquidating trust, with remainder to Gould after creditors were paid. Gould was, after October 10, 1985, once again an independent and responsible economic agent, freed of the duties that he had assumed as debtor in possession. And whereas prior to confirmation there existed two separate taxpayers—Gould and his bankruptcy estate—the relevant tax duties were unified upon confirmation in the hands of Gould personally.[20]

In short, there are two distinct reasons why respondent Smith is not "the fiduciary" of "an estate of an individual under chapter * * * 11" within the meaning of section 6012(b)(4). First, by the time the liquidating trust came into being, Gould's chapter 11 estate *had ceased to exist*, with the logical corollary that the liquidating trustee can never have been "the fiduciary" of that estate. Indeed, the debtors concede in a footnote that "the 'estate of an individual under Chapter 11' terminated upon confirmation of the Plan of Reorganization" (Holywell Br. 30-31 n.34). In view of that concession, the debtors understandably lack enthusiasm about the Government's argument on this point.

Second, for the entire period during which Gould's chapter 11 estate did exist, "the fiduciary" of that estate was Gould in his capacity as debtor in possession. The Government argues that the liquidating trustee possesses fiduciary powers and that "the term 'fiduciary' should be given its generic, ordinary meaning" (U.S. Br. 35). That is correct, but beside the point. Many individuals, including innumerable accountants and lawyers, have possessed fiduciary powers with respect to Gould's bankruptcy estate. But they are not therefore required to file tax returns on its behalf. Rather, returns of an individual's bankruptcy estate are to be filed "by *the fiduciary* thereof" (IRC§ 6012(b)(4) (emphasis added)). That fiduciary was plainly Gould himself as debtor in possession.[21]

[20] Whereas Gould's separate bankruptcy *estate* terminated at confirmation, the underlying bankruptcy *case* of course continues to the present time. Article XIV of the Plan provides that "[t]he Court shall retain jurisdiction after confirmation until all payments and distributions called for under the Plan have been made and until the entry of final decree" (J.A. 52). Bankruptcy courts routinely retain post-confirmation jurisdiction over "cases under title 11" to ensure that the plan's purpose and intent are carried out. 5 L. King, *Collier on Bankruptcy* ¶ 1123.02[5], at 1123-23. *See Abbott v. Blackwelder Furniture Co.*, 33 B.R. at 402 (distinguishing between bankruptcy "estate" to be administered by trustee and bankruptcy "case" over which court may retain jurisdiction); *In re Westholt Manufacturing*, Inc., 20 B.R. at 372 (same).

2. *The Liquidating Trustee Is Not "The Fiduciary" Of A Separate Taxable Trust*

The debtors advance a different argument to support the application of section 6012(b)(4) to Gould individually. They contend that the liquidating trustee is "the fiduciary" of a separate taxable "trust" created in part for Gould's benefit (Holywell Br. 30). The half-hearted character of this argument—it occupies a single paragraph in their brief—reflects the fact that it represents a complete re-

[21] The cases cited by the Government for the proposition that a "liquidating trustee" should shoulder a former debtor's tax obligations are wholly inapposite. *See* U.S. Br. 36, *citing In re Bentley*, 916 F.2d 431 (8th Cir. 1990), and *In re Joplin*, 882 F.2d 1507 (10th Cir. 1989). Both cases involve liquidating bankruptcies under chapter 7 (entitled "Liquidation"), in which a trustee is invariably appointed to dispose of the debtor's assets, and in which there can be no "debtor in possession." *See* BC §§ 701-704. In chapter 7 cases, the trustee is clearly "the fiduciary" of the individual bankruptcy estate; just as obviously, the debtor in possession is "the fiduciary" of the chapter 11 estate involved here. In describing the trustee in *Joplin* as a "liquidating trustee" (U.S. Br. 36), the Government seeks to draw a bogus parallel between that case and this. The *Joplin* trustee was a "liquidating trustee" in the sense that he was appointed as statutory trustee to conduct a chapter 7 liquidation. In the present case, by contrast, no statutory trustee was appointed for the chapter 11 estate, and Gould remained debtor in possession; respondent Smith is a "liquidating trustee" only in the sense that he was appointed post-confirmation to disburse funds to Gould's creditors.

versal of the debtors' position below. Both the Government and the debtors conceded in bankruptcy court that "the trust is not a separate taxable entity" (Pet. App. 30a). Rather, as all parties have heretofore agreed, the taxpayers whose obligations are at issue are Gould and his corporations. Because the liquidating trust is not separately taxable, it is not required to file tax returns reporting the income at issue.

The reason why the liquidating trust is not separately taxable is that it is a "grantor trust," as the bankruptcy and district courts correctly held (Pet. App. 24a-25a, 33a-36a). As a general rule, trusts and estates are legal entities subject to tax. *See* IRC § 641(a). But the Internal Revenue Code carves out one species of trust—so-called "grantor trusts"—as to which the settlor or "grantor," rather than the trust, is treated as "the owner" of the subject property. As deemed "owner" of the property, the grantor—here, the reorganized debtor—is taxable directly on the income it generates. *See* IRC §§ 671, 672-679.[22]

Trusts are classified as "grantor trusts" in a number of commonly-arising situations. These include circumstances where the grantor retains a 5% or larger reversionary interest in the corpus (IRC § 673) or where trust income may be distributed to the grantor on a current or accumulated basis (IRC § 677). A "distribution" is deemed to occur if trust income may be used to discharge the grantor's legal obligations. Treas. Reg. § 1.677(a)-1(d); *see, e.g.*, *Douglas v. Willcuts*, 296 U.S. 1 (1935). This means that where, as here, assets are set aside to pay creditors and the debtor-settlor remains entitled to the surplus, if the

[22] Because "grantor trust" items are not taxable to the trust, they are not shown on the trust's return, but on an "attached statement." Treas. Reg. § 1.671-4.

arrangement constitutes a trust for tax purposes, it will be a grantor trust.[23]

Seeking to challenge this result, the debtors assert that the grantor trust provisions apply only in the case of a "voluntary, donative transfer" (Holywell Br. 48, 49). This assertion is plainly incorrect. The grantor trust provisions have regularly been applied in commercial, non-donative contexts,[24] including the bankruptcy context.[25] Whether a transfer is "voluntary" is wholly irrelevant for this purpose.[26] The case that petitioners cite for the contrary proposition—*DePinto v. United States*, 585 F.2d 405 (9th Cir. 1978)—correctly held that an individual's *bankruptcy estate* is not a grantor trust. That holding lends no support to the debtors' assertion that the grantor trust provisions do not apply in bankruptcy cases at all.

The fact that the liquidating trust is a "grantor trust" may not be a complete answer to the question presented

[23] *E.g.*, *Stockton v. United States*, 335 F. Supp. 984 (C.D. Cal. 1971); *In re Sonner*, 53 B.R. 859 (Bankr. E.D. Va. 1985); *see also Federation Bank & Trust Co. v. Commissioner*, 27 T.C. 960 (1957), *aff'd*, 256 F.2d 764 (2d Cir. 1958). If assets are set aside to secure an obligation to pay creditors and the arrangement does not rise to the level of a trust, the same result obtains without recourse to the grantor trust rules. In that event, the assets would simply remain the property of the debtor, to whom the income would be taxed under ordinary tax principles.

[24] *E.g.*, *Douglas v. Willcuts*, 296 U.S. 1 (1935) (alimony trust); *Anesthesia Service Medical Group, Inc. v. Commissioner*, 825 F.2d 241 (9th Cir. 1987), *aff'g* 85 T.C. 1031 (1985) (malpractice self-insurance trust); *Rusoff v. Commissioner*, 65 T.C. 459 (1975), *aff'd*, 77-1 U.S.T.C. ¶ 9338 (2d Cir. 1977) (trust formed to exploit cigarette filter patent); Rev. Rul. 85-158, 1985-2 C.B. 175 (trust to secure commodity clearinghouse obligations); Rev. Rul. 77-230, 1977-2 C.B. 214 (trust to secure obligation to tort claimant); Rev. Rul. 61-175, 1961-2 C.B. 128 (investment vehicle for bank consortium).

[25] *In re Sonner*, 53 B.R. 859 (Bankr. E.D. Va. 1985) (applying grantor trust provisions to a post-confirmation liquidating trust).

[26] *Vreeland v. Commissioner*, 16 T.C. 1041, 1048-1049 (1951).

here. Given that Gould and his entities are directly taxable on the trust's income as "the owners" of its assets, section 6012(b) must still be considered in determining whether the liquidating trustee can be required to file returns and pay tax on their behalf. However, the fact that the liquidating trust is a "grantor trust" does dispose of the issue raised by the debtors' eleventh-hour reconstruction of section 6012(b)(4). Contrary to their submission, the liquidating trustee is not required to assume Gould's individual tax obligations as "the fiduciary" of a separate taxable trust.[27]

B. Section 6012(b)(3) Of The Internal Revenue Code Does Not Require The Liquidating Trustee To Assume The Tax Duties Of The Reorganized Corporate Debtors

Section 6012(b)(3) applies "[i]n a case where a receiver, trustee in a case under title 11 of the United States Code or assignee * * * has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated." In such circumstances, section 6012(b)(3) provides that the "receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns."[28]

[27] Although the debtors resist classification of the liquidating trust as a grantor trust, neither they nor the Government offers any other rationale to explain why the trust is not a separate taxable entity, as all parties conceded below. Moreover, the debtors wholly ignore the ramifications of their new "trust" theory. If the trust *were* a separate taxable entity, it would be such with respect to *all* the trust beneficiaries, corporate as well as individual; that would make resort to section 6012(b)(3) wholly unnecessary as applied to the corporate debtors. The debtors likewise ignore the fact that separate-entity status for the trust would entail an entirely different regime of taxation under IRC §§ 641-668, which govern taxation of trusts and their beneficiaries.

[28] By its terms, section 6012(b)(3) is restricted to returns of *corporations*. Thus, all parties agree that the relevance of this section is limited to determining the proper person to file returns for the reorganized corporations, namely Holywell and MCC.

The court of appeals properly construed this provision to apply in situations where a fiduciary steps into the shoes of a taxpayer—where he has plenary power to manage the taxpayer's affairs and acts as the taxpayer's substitute or "alter ego." Because the liquidating trustee's powers are limited to disposing of certain trust assets and returning the balance to the debtors, and because he has no power to represent or act for the reorganized corporations, the court of appeals held that he is not required to file their tax returns under section 6012(b)(3). As we shall show, the court of appeals' construction of the statute is consistent with its language and history, with prior judicial interpretations, and with common sense.

1. *The Liquidating Trustee Is Not "A Trustee In A Case Under Title 11"*

The court of appeals held that the term "trustee in a case under title 11," as used in section 6012(b)(3), is a term of art denoting the trustee appointed by a bankruptcy court to take charge of the debtor's estate and manage its business prior to confirmation of the plan. That holding, far from being the exercise in judicial invention that petitioners imagine, precisely reflects the terms and terminology of the relevant statutes. In particular, the court of appeals properly adopted as the meaning of "trustee in a case under title 11" the specialized meaning of "trustee in a case under this title," the equivalent term used in title 11, the Bankruptcy Code itself.

a. The term "trustee in a case under this title" (or its equivalent, "trustee in the case") is invariably used in title 11 to mean a trustee appointed to manage the debtor's estate after the bankruptcy petition is filed. Section 322(a), entitled "Qualification of Trustee," catalogues the seven particular provisions of the Bankruptcy Code under which a person may be selected "to serve as trustee

in a case under this title." Each of those sections deals with the installation in office of a pre-confirmation trustee with broad management powers over the debtor's estate.[29]

The general qualifications, powers, and duties of a "trustee in a case under title 11" are set out in chapters 3 and 5 of that title.[30] Section 323, entitled "Role and Capacity of Trustee," specifically defines "[t]he trustee in a case under this title" as "the representative of the estate." Chapters 7, 11, 12, and 13 lay out alternative bankruptcy options for private persons; each permits or requires the appointment of an official to manage the debtor's estate during the proceeding, and each specifically refers to that official as the "trustee in a case under this title" or

[29] *See* BC § 701 (specifying procedure for appointing "interim trustee in the case" under chapter 7 and stating that such person "is a trustee in a case under this title"); BC § 702 (same, creditor vote to elect "trustee in the case"); BC § 703 (same, appointment of successor to serve as "trustee in the case"); BC § 1104 (specifying procedure for appointing "trustee in the case" under chapter 11); BC § 1163 (specifying procedure for appointing "trustee in the case" in railroad reorganizations); BC § 1202(a) (specifying procedure for appointing "trustee in the case" under chapter 12 family-farmer proceeding); BC § 1302(a) (specifying procedure for appointing "trustee in the case" under chapter 13 wage-earner proceeding). *Cf.* BC § 1107(a) (debtor in possession has, with certain limited exceptions, all rights and duties "of a trustee serving in a case under this chapter").

[30] *E.g.*, BC §§ 321 (eligibility); 322 (qualification); 323 (role and capacity); 324 (removal); 325 (vacancy); 326, 330, and 331 (compensation); 327 (employment of professionals); 343 (power of examination of the debtor); 345 (power of handling funds of the estate); 347 (rights over unclaimed property); 361 (duty to protect estate interest in property); 363 (power to use, sell, or lease estate property); 364 (power of obtaining credit); 365 (power over executory contracts); 544 (power to avoid transfers); 545 (power to avoid liens); 547 (power to recover preferences); 548 (power to avoid fraudulent conveyances); 549 (power to avoid post-petition transfers); 553 (power to recover offsets); and 554 (power to abandon debtor's property). Section 103(a) of the Bankruptcy Code makes the provisions of chapters 1, 3, and 5 applicable to cases under chapter 7, 11, 12, and 13. (No "trustee in the case" can be appointed in chapter 9, dealing with municipal bankruptcy.)

"trustee in the case." The trustee's detailed powers and duties vary somewhat from chapter to chapter, but in each instance the repository of these functions is the one individual holding the office of "trustee in the case."

Section 1104 governs the appointment of a "trustee in a case under this title" in a proceeding under chapter 11, the part of the Bankruptcy Code invoked by the debtors here. A chapter 11 trustee is normally appointed "for cause, including fraud, dishonesty, incompetence, or gross mismanagement" by the debtor's officers (BC § 1104(a)(1)). This trustee must be appointed during the administrative phase of the case, that is, "[a]t any time after the commencement of the case *but before confirmation of a plan*" (BC § 1104(a) (emphasis added)). Upon appointment, the trustee replaces the debtor in possession and assumes comprehensive management of the debtor's business. His powers are spelled out in section 1106 by reference to provisions of chapter 7 that govern the powers of the "trustee in the case."[31]

b. The court of appeals correctly held that the term "trustee in a case under title 11," as used in section 6012(b)(3), has the same meaning that it has in the Bankruptcy Code, namely, a trustee who steps into the debtor's shoes with plenary powers to manage its business and

[31] The term "trustee" as used in the Bankruptcy Rules likewise refers exclusively to a pre-confirmation trustee endowed with plenary powers over the debtor's estate. *E.g.*, Rule 1019(5) (requiring "debtor in possession or trustee" to turn over records and property of estate to chapter 7 trustee in conversion case); Rule 2015 (requiring "trustee or debtor in possession" to keep records, make reports and give notice); Rule 6009 (authorizing "trustee or debtor in possession" to prosecute and defend actions on behalf of debtor or estate); Rule X-1007(b) (requiring "[a] trustee or debtor in possession" to cooperate with the United States Trustee); Rule 2002, Adv. Comm. Note (stating that, in lieu of notice by clerk, the court may order "the trustee or debtor in possession" to transmit notices).

property.[32] Where a tax statute borrows a term of art from another law, it is a reasonable inference that Congress intends the words to mean the same thing. *Cf. Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 813 (1989). That inference is mandatory here, because Congress specifically stated its intention in this respect.

The term "trustee in a case under title 11" was inserted into section 6012(b)(3) as a part of the Bankruptcy Tax Act of 1980, Pub. L. No. 96-589, § 6(i)(5), 94 Stat. 3410. Prior to this amendment, the statute had referred to a "trustee in bankruptcy" (26 U.S.C. § 6012(b)(3) (1976)). The legislative history explains that the change was one of several "technical and conforming amendments" designed "to substitute references to bankruptcy cases under new title 11 of the U.S. Code for references to bankruptcy proceedings under the now-repealed Bankruptcy Act." S. Rep. 1035, 96th Cong., 2d Sess. 52 (1980). The amendment to section 6012(b)(3) in particular was described as "substituting a reference to a trustee in a bankruptcy case under new 11 U.S. Code" for the previous reference to "trustee in bankruptcy," the equivalent term used in the old Bankruptcy Act. *Id.* at 53; *accord*, H.R. Rep. 833, 96th Cong., 2d Sess. 47-48 (1980).[33] This makes it perfectly clear

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[32] The court of appeals ruled that "section 6012 refers only to trustees who are appointed under chapter 11 of the Bankruptcy Code" (Pet. App. 11a). The debtors criticize this statement, asserting that the court "confused *title* 11 * * * with *chapter* 11" (Pet. 15). This criticism is unjustified: since this is a chapter 11 case, the court naturally focused on what section 6012(b)(3) means in the chapter 11 context. Nothing in its opinion suggests that it intended to exclude trustees appointed under chapters 7, 12, or 13 of the Bankruptcy Code from the definition of "trustee in a case under title 11."

[33] As used in the Bankruptcy Act of 1898, the term "trustee in bankruptcy" referred to trustees appointed with comprehensive management powers over the debtor's affairs. *See, e.g., Butner v. United States*, 440 U.S. 48 (1979); *Otte v. United States*, 419 U.S. 43 (1974); and *Kokoszka v. Belford*, 417 U.S. 642 (1974).

that Congress intended to conform the terminology of section 6012(b)(3) to that of the Bankruptcy Code.

c. The statute's earlier history confirms the conclusion that "trustee in a case under title 11" refers to a bankruptcy trustee who acts as surrogate for the debtor with full power to manage its affairs. Section 6012(b)(3) originated as section 13(c) of the Revenue Act of 1916, ch. 463, 39 Stat. 756. It applied to "receivers, trustees in bankruptcy, or assignees" who were "operating the property or business of corporations." It required those persons to "make returns of net income *as and for* such corporations * * *, in the same manner and form as such [corporations are] required to make returns" (39 Stat. 771 (emphasis added)).

Section 13(c) was enacted in response to this Court's decision in *United States v. Whitridge*, 231 U.S. 144 (1913). The Court there held that corporations in receivership were immune from tax under the 1909 corporate tax law, on the theory that the receivers who operated the corporations' railway business "did this as officers of the court * * * not as officers of the respective corporations" (231 U.S. at 149). Section 13(c) overturned this result by providing that *surrogates* for a corporation—whether in bankruptcy, receivership, corporate dissolution, or state-law insolvency proceedings—were to be taxed as if they were the corporation itself. Early regulations made this intention clear:

> When a corporation is dissolved its affairs are usually wound up by a receiver or trustee in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees *stand in the stead of the corporation* for such purposes. Any sales of property by them are to be treated *as if made by the corporation* for the purpose of ascertaining the gain or loss.

Regulations 45, Art. 547 (1919) (emphasis added).

Consistent with this history, the courts have applied section 6012(b)(3) in bankruptcy cases exclusively to pre-confirmation trustees who step into the shoes of a corporation with comprehensive power to manage its operations.[34] The Government and the debtors have cited no case, and our research has discovered none, in which a court construed "trustee in bankruptcy" or "trustee in a case under title 11" to apply to a person who was *not* a statutory trustee, or who functioned solely in the post-confirmation context, or who possessed the limited powers and duties of the liquidating trustee here.

d. Respondent Smith in no sense "stands in the stead of" the debtor corporations and he is clearly not "a trustee in a case under title 11" as that term is used in section 6012(b)(3). Respondent Smith was not appointed as the "trustee in the case" to administer the debtors' estates during the pre-confirmation phase of the bankruptcy proceeding. To the contrary: his job is to disburse funds from a trust established *after* confirmation of the plan. His powers are those useful in carrying out this limited post-confirmation task; they are vastly inferior to the powers that

[34] Most of the bankruptcy cases cited by petitioners concern disputes over whether a "trustee in bankruptcy" was operating the debtor's business or engaged in mere liquidating activities—a distinction that was relevant under the pre-1954 version of section 6012(b)(3). *See, e.g., United States v. Sampsell*, 266 F.2d 631 (9th Cir. 1959); *United States v. Metcalf*, 131 F.2d 677 (9th Cir. 1942), *cert. denied*, 318 U.S. 769 (1943); *see also Security-First Nat'l Bank v. United States*, 153 F.2d 563 (9th Cir. 1946) (holding that taxes imposed on a "trustee in bankruptcy" were payable as expenses of administration). The courts subsequently held that the "operating vs. liquidating" distinction did not survive the 1954 amendments. *E.g., In re I.J. Knight Realty Corp.*, 501 F.2d 62 (3d Cir. 1974). The court held in *In re Sapphire S.S. Lines, Inc.*, 762 F.2d 13 (2d Cir. 1985), that a bankruptcy trustee was required to make quarterly payments of estimated tax, the trustee having conceded the application of section 6012(b)(3). In none of these cases was section 6012(b)(3) applied to a person other than a statutory trustee.

would have been conveyed had a "trustee in the case" been appointed under BC § 1104(a) to oust the debtors in possession from their estates. *See* BC § 1106, 1108.[35]

Most importantly, the liquidating trustee is not now and has never been "the representative of the estate" (BC § 323(a)), the central function of "a trustee in a case under title 11." By the time respondent Smith was appointed, the debtors' bankruptcy estates had terminated. The debtor corporations had been discharged from bankruptcy and regained full control of their own activities. Far from being a *surrogate* for the reorganized debtors, the liquidating trustee has absolutely no say in their business. His powers and duties are strictly confined to the liquidating trust.

Whereas it makes perfect sense for a "trustee in a case under title 11" to file tax returns on behalf of a corporation in bankruptcy, it makes no sense for respondent Smith to file tax returns on behalf of the reorganized debtors here. A "trustee in the case" under chapter 11 *represents* the corporation and has complete dominion over its affairs. This authority necessarily encompasses the filing of tax returns; indeed, where previous management has been ousted, there would be no one who *could* file the corporation's returns if the statutory trustee did not do so.[36]

[35] Significantly, one of the main duties assigned the "trustee in the case" under chapter 11 is the duty to file a reorganization plan. *See* BC §§ 1106(a)(5), 1121. The liquidating trustee obviously did not have as one of his duties the filing of the plan that led to his appointment.

[36] *See* Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws—Income Tax Liabilities of the Estate and the Debtor*, 72 Mich. L. Rev. 938, 975-976 (1974) ("[Since] the corporate officers and accounting personnel will no longer be on the payroll, * * * they can hardly be expected to undertake without compensation the task of preparing a return that, by law, is not their obligation but that of their former employer. Congress has elected to charge the trustee, as one of his duties, with the obligation to prepare the return 'for such corporation,' and, since the trustee will have or can get possession of the

Precisely the opposite situation exists here. The reorganized debtors have emerged from bankruptcy with their own managers in place. These managers have complete control over the corporate books and records and thus possess thorough knowledge of the corporations' affairs. These managers were responsible for satisfying the corporations' tax obligations prior to bankruptcy. They were responsible, as debtors in possession, for satisfying the corporations' tax obligations during administration of the chapter 11 estates. And they are the only ones capable of continuing to satisfy the corporations' tax obligations now that the plan of reorganization has been confirmed.

The liquidating trustee, by contrast, had no involvement in the debtors' pre-confirmation tax affairs, has no knowledge of their post-confirmation business, and has no practical way of securing relevant tax information from them. During the six years of the trust's existence, respondent Smith has had "control" of only two items of corporate income: sales proceeds received during 1984-1985, and interest received during 1985-1991. Given his exceptionally narrow window on the reorganized debtors' tax universe, he is in no position to displace their managers as the person responsible for filing their tax returns.

e. The Government argues (U.S. Br. 20-22) that since the liquidating trustee is a trustee, and since this case arises under title 11, respondent Smith is necessarily "a trustee in a case under title 11." This syllogism has nothing but its simplicity to recommend it. It ignores the fact that "trustee in a case under this title" is a term of art in the Bankruptcy Code, used in the chapter 11 context to refer exclusively to a trustee appointed under section 1104(a) to serve as plenary pre-confirmation representative of the estate. *See* pages 29-31, *supra*.

books and records * * * and will be employing the personnel who remain connected with the business, he is the only one in a position to make a return.")

Equally telling, the Government's syllogism ignores the fact that the Bankruptcy Code explicitly provides, in a separate section (BC § 1123), for a distinct category of trustee—denominated a "trustee under the plan"—whose responsibilities, like those of respondent Smith, are limited to duties incident to implementing a chapter 11 plan. Section 1123, entitled "Contents of Plan," states that "a plan shall * * * provide adequate means for the plan's implementation" (BC § 1123(a)(5)). A number of appropriate implementing devices are listed, including the "transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan" (BC § 1123(a)(5)(B)). The term "entity" is elsewhere defined to include "trust" (BC § 101(14)). Section 1123(a)(7) then provides that the plan may include provisions, consistent with claimants' interests and public policy, specifying "the manner of selection of any officer, director, or *trustee under the plan*" (emphasis added). The order appointing the liquidating trustee here notes that he was "to serve as trustee under the Bank's Plan." Bankr. C.P. 916.

In short, it was to the position of "trustee under the plan," and not to that of "trustee in the case," that respondent Smith was appointed. Only by ignoring the terminology, history, and intent of the key Bankruptcy Code provisions can the Government seek to characterize him as a "trustee in a case under title 11."

2. *The Liquidating Trustee Is Not A "Receiver" or "Assignee"*

As a secondary position, the Government maintains that the liquidating trustee, even if he is not a "trustee in a case under title 11," is nevertheless required to file returns under section 6012(b)(3) as a "receiver" or "assignee" of the debtor corporations. The authorities that the Government cites provide no support for this position. In every instance where a fiduciary has been required to file returns

as a "receiver" or "assignee," that fiduciary (1) was acting as a surrogate for the corporation with plenary powers to run its business, or (2) was carrying out a process that involved ending the corporation's existence. Each such fiduciary—whether styled a "receiver," "assignee for the benefit of creditors," "trustee in dissolution," or "liquidating trustee"—stood in the shoes of corporate management and thus held a status *equivalent to* that of a "trustee in a case under title 11." The courts, in other words, have correctly interpreted the terms of section 6012(b)(3) as being *in pari materia*. They have never required a limited-purpose fiduciary, like the liquidating trustee here, to file returns for a corporation that has successfully emerged from federal bankruptcy proceedings.

a. The terms "receiver" and "assignee," as used in section 6012(b)(3) and its predecessors, have been construed to refer to a variety of officials serving in a variety of settings outside the federal bankruptcy context. Courts that have applied section 6012(b)(3) outside bankruptcy have done so in two general categories of cases. The first is corporate liquidation or dissolution. A liquidating corporation continues in existence for tax purposes for so long as it has assets or conducts any activity, and section 6012(b)(3) ensures that its return will be filed by the fiduciary in charge of its affairs, variously termed a "liquidating receiver," a "trustee in dissolution," or a "liquidating trustee." However denominated, this individual is charged with winding up the corporation, liquidating its assets, and effecting its dissolution.[37]

[37] *See, e.g., Hersloff v. United States*, 310 F.2d 947 (Ct. Cl. 1962), *cert. denied*, 373 U.S. 923 (1963) ("liquidating trustees" for dissolved corporation); *United States v. Loo*, 248 F.2d 765 (9th Cir. 1957), *cert. denied*, 356 U.S. 928 (1958) ("trustee in dissolution"); *First Nat'l Bank v. United States*, 86 F.2d 938, 942 (10th Cir. 1936) (trustee for dissolving corporation where "assignment [was] made to an alter ego for convenience"); *Tazewell Electric Light & Power Co. v. Strother*, 84 F.2d 327 (4th Cir. 1936) (trustee for dissolved corporation); *Whitney Realty Co. v. Commissioner*, 80 F.2d 429 (6th Cir. 1935), *cert. denied*, 298 U.S. 668 (1936) (same); *Northwest Utilities Securities Co. v. Helvering*, 67 F.2d 619 (8th Cir. 1933), *cert. denied*, 291 U.S. 684 (1934) ("trustees in dissolution"); *Hellebush v. Commissioner*, 65 F.2d 902 (6th Cir. 1933) (trustee for dissolved corporation); *Taylor Oil & Gas Co. v. Commissioner*, 47 F.2d 108 (5th Cir.), *cert. denied*, 283 U.S. 862 (1931) ("liquidating trustees"); *Smith v. Commissioner*, 26 B.T.A. 1178 (1932) (same). In each of these cases, the fiduciary was in unchallenged control of corporate affairs, and no one denied that if the corporation had to file a return, the fiduciary had to file it; the disputes concerned whether the corporation continued to exist and whether the fiduciary acted for it or for its shareholders. *Compare, e.g., Merchants Nat'l Bldg. Corp. v. Commissioner*, 45 B.T.A. 417 (1941), *aff'd*, 131 F.2d 740 (5th Cir. 1942), where a corporation retained its own management but set up a "liquidating trust" to hold some of its assets shortly before it dissolved; the court held that the "liquidating trust" had separate existence apart from the corporation. In *National Metropolitan Bank v. United States*, 345 F.2d 823 (Ct. Cl. 1965), a liquidating bank assigned its assets and liabilities to a *purchaser*; contrary to the Government's parenthetical (Br. 28 n.21), the holding was not that the assignee was a section 6012(b)(3) fiduciary (the bank had its own liquidating committee), but that the bank's tax existence survived the assignment for the purpose of taking certain deductions. *J. Ungar, Inc. v. Commissioner*, 244 F.2d 90 (2d Cir. 1957), also cited by the Government (Br. 28 n.21), held that a corporation continued in existence for purposes of recognizing income after assigning the bulk of its assets to its shareholder; the court specifically did *not* hold that the distributee shareholder "operated the corporation's business," and no other fiduciary was involved.

The second category of cases consists of equity insolvency proceedings or their equivalent, state-law "assignments for the benefit of creditors."[38] In such cases, section 6012(b)(3) applies to the "receiver" or "assignee" who is charged, outside the federal bankruptcy context, with the same duties as a "trustee in a case under title 11"—

[38] *See generally* 6A C.J.S. *Assignment for Benefit of Creditors* (1975); 21 C.J.S. *Creditor and Debtor* §§ 2-83 (1990). A general "assignment for the benefit of creditors" is treated as the functional equivalent of an equity insolvency proceeding under IRC § 6871(a), which authorizes the immediate assessment of taxes "[o]n the appointment of a receiver for the taxpayer in any receivership proceeding" before a state or federal court. *See Williams v. Commissioner*, 44 T.C. 673 (1965).

namely, operating the day-to-day business of a corporation in financial distress.[39]

The "receivers" and "assignees" involved in these two categories of cases share a single unifying characteristic: they functioned as *surrogates* for the corporate managers. The very first regulations issued under the statute explicitly recognize this fact:

> Notwithstanding that the powers and functions of a corporation are suspended and that the property and business are for the time being in the custody of the receiver, trustee, or assignee * * * such receiver, trustee, or assignee *stands in the place of the corporate officers* and is required to perform all the duties and assume all the liabilities which would devolve upon the officers of the corporation were they in control.

Regulations 33, Art. 209 (1918) (emphasis added).

Regulations issued in 1919 under provisions governing corporate liquidation likewise provided that receivers or trustees in dissolution "stand in the stead of the corporation" for the purpose of liquidating its assets and paying its debts, so that "[a]ny sales of property by them are to be treated as if made by the corporation." Regulations 45,

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[39] *See, e.g., Pinkerton v. United States*, 170 F.2d 846 (7th Cir. 1948) (receiver appointed to manage corporation); *Louisville Property Co. v. Commissioner*, 140 F.2d 547 (6th Cir.), *cert. denied*, 322 U.S. 755 (1944) (assignee under general assignment for benefit of creditors); *Kavanagh v. First Nat'l Bank*, 139 F.2d 309 (6th Cir. 1943) (receiver for insolvent bank); *State ex rel. Gibson v. American Bonding & Cas. Co.*, 225 Iowa 638, 281 N.W. 172 (1938) (court-appointed "liquidating receiver" in insolvency proceeding). In each of these cases, the corporation had no existence independent of the receiver or other fiduciary who managed it. In *United States v. McDonald & Eide, Inc.*, 670 F. Supp. 1226 (D. Del. 1987), *aff'd*, 865 F.2d 73 (3d Cir. 1989), also cited by the Government (Br. 28 n.21), the court held that the corporation no longer existed at all.

Art. 547 (1919). And referring to the original version of what is now section 6012(b)(3), this Court has ruled that "[t]he language of the section contemplates a *substitution* of the receiver for the corporation; and there can be such substitution only when the receiver is in complete control of the properties and business of the corporation." *North American Oil Consolidated v. Burnet*, 286 U.S. at 422-423 (citations omitted). Nothing in the subsequent development of the statute—whether by legislative change, regulatory interpretation, or judicial construction—has changed this basic requirement.

b. Respondent Smith is not a "receiver" or "assignee" as those terms are used in section 6012(b)(3) and the cases interpreting it. He is serving in a federal bankruptcy case, not in an equity insolvency proceeding. The corporations whose taxes are at issue have not been liquidated or dissolved. Quite the contrary: they have been successfully reorganized and have emerged from chapter 11 to embark on new profit-seeking activities. The liquidating trustee is not "a substitute" for, nor does he "stand in the place of," the officers of the reorganized corporations. Indeed, he has no power whatever to act for those corporations, which since October 1985 have been under the sole control of their own separate management. *See* Rev. Rul. 84-123, 1984-2 C.B. 224 (section 6012(b)(3) applies to a corporation "in receivership, in dissolution, or *in the hands of an assignee*") (emphasis added).

Relying in part on *Webster's Third New International Dictionary*, the Government contends (U.S. Br. 25-26) that the term "assignee" should be read to mean anyone "to whom a right or property is legally transferred." Under this interpretation, "assignee" would swallow up the other terms of the statute, making "receiver" and "trustee in a case under title 11" wholly redundant. This interpretation finds no support in the case law, in the history of the statute, or in standard principles of statutory construction. Congress clearly intended "receiver" and "as-

signee" to reach fiduciaries *in situations other than bankruptcy* who perform roles analogous to those of the statutory trustee in a federal bankruptcy case. Respondent Smith is serving in a federal bankruptcy case, and he is not the statutory trustee. If he is not required to file under section 6012(b)(3) as a "trustee in a case under title 11"—and we have shown that he is not—he is not required to enter through the back door and file as a "receiver" or "assignee."

C. No Other Statutory Provision Requires The Liquidating Trustee To Assume The Reorganized Debtors' Tax Obligations

Gould and his entities, while not abjuring section 6012(b)(3), place chief reliance on two statutory provisions outside the Internal Revenue Code: 28 U.S.C. § 960 and 31 U.S.C. § 3713. Both provisions are plainly inapposite; indeed, the Government does not urge either of them. Respondent Smith's brief, on which we rely, covers these points persuasively and comprehensively. We will supply the short answers only.

Section 960 does not impose any substantive tax obligation. It simply prevents a court-appointed officer from claiming *immunity* from an otherwise applicable tax. Respondent Smith is claiming no such immunity. Rather, he contends that the tax is not applicable to him in the first place, because he is not a person encompassed within section 6012(b).

Section 3713 is a federal priority statute. By its terms,it "does not apply to a case under title 11," where priorities are governed exclusively by the Bankruptcy Code. This is plainly "a case under title 11." If it were not, neither the bankruptcy court nor this Court would have jurisdiction over it. And there is no inconsistency between this proposition and our submission that respondent Smith is not "a trustee in a case under title 11." Lacking plenary powers to manage the debtors' business, respondent Smith is

not a "trustee in a case under title 11." But this case still arises under the Bankruptcy Code.

III. The Government's Policy Arguments Do Not Justify The Result For Which It Contends

The Government asserts that unless respondent Smith files tax returns for the reorganized debtors and pays their taxes, the taxes will never be collected. That is said to be so because, as the Solicitor General surmises, the reorganized debtors "evidently lack funds to satisfy the very substantial tax liabilities at issue" (U.S. Br. 13).

This argument cannot be countenanced, for two distinct reasons. First, there is not a bit of record evidence—the Solicitor General certainly cites none—to support either of the factual predicates underlying this argument. The Government, therefore, cannot properly advance it in this Court. Second, even if the requisite factual predicate existed, the argument would not show the correctness of the Government's construction of section 6012(b). Rather, it would show the need for the IRS to avoid repetition of the procedural lapses that generated the dilemma it hypothesizes.

A. The Government's policy argument has two factual predicates: that the tax liabilities at issue are "very substantial" and that the reorganized debtors "lack funds to satisfy" them. There is no evidence in the record to support either assertion.

The Solicitor General states (U.S. Br. 6 n.4) that he has been informed by the IRS that "it has now tentatively computed Holywell's [fiscal 1986 tax liability] to be in excess of $33 million." The debtors' brief similarly states: "According to the [IRS] agent's preliminary findings, the liabilities of the Holywell * * * and Gould estates [for fiscal 1986 and calendar 1985, respectively] total more than $35 million" (Holywell Br. 6 n.8). The record, however, contains no evidence of the *existence* of such an IRS audit,

much less of its outcome or of the facts that would be needed properly to determine the reorganized debtors' actual tax liabilities.[40]

In light of the Government's unsubstantiated claims of large tax liabilities, evidently based solely on unadjudicated IRS agent reports, it is appropriate to observe that Gould is a substantial real estate operator, and that such taxpayers and their related entities frequently have loss carryovers, depreciation, and other deductions that substantially reduce their gross income. Holywell has some 20 subsidiaries with whom it filed a consolidated federal income tax return for fiscal 1985. Nineteen of those subsidiaries did not petition for bankruptcy, and most of them have presumably continued their business operations throughout these proceedings. Without comprehensive knowledge of the tax affairs of Gould and the Holywell subsidiaries, it is impossible to say what (if any) actual tax bill might result when the trust-generated interest and capital gain or loss are combined with other items of income, deduction, and loss on the reorganized debtors' returns.

Although the Solicitor General asserts that the reorganized debtors "evidently lack funds" to satisfy whatever tax liabilities they may have, he cites no evidence to support that statement. Gould has been out of bankruptcy for six years, and the record contains no evidence about his current balance sheet. As for the corporate debtors, there is nothing in the record about what post-confirmation assets they have acquired. It was originally anticipated that

[40] Respondents have made written requests, both to the Solicitor General and to the debtors, for information concerning the supposed IRS audit of Holywell and Gould. The Solicitor General made no response to these requests. The debtors responded by inviting the liquidating trustee to send "an accountant from Arthur Anderson" to a meeting "with representatives of the Internal Revenue Service and the taxation agencies of the states of Florida and Virginia" at Gould's office on September 13, 1991—the last business day before respondents' briefs in this Court were due to be filed.

the trustee would finish his work quickly, and that the debtors would receive a substantial reversion from the liquidating trust. *See* pages 4 & 15-16, *supra*. Although the debtors' litigiousness has made both the timing and the amount of the reversion uncertain, it is surely true that reorganized corporations *normally* have positive net worth. *See generally* 5 L. King, *Collier on Bankruptcy* ¶ 1129.02[11], at 1129-53 (15th ed. 1991). Section 1129(a)(11) of the Bankruptcy Code makes it a condition of confirming a chapter 11 plan that confirmation "is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor."

In short, there is no record evidence to support the Solicitor General's assertion that the reorganized debtors "evidently lack funds to satisfy the very substantial tax liabilities at issue." The Court should therefore decline to consider his argument that the reorganized debtors' taxes, if not collected from the trust, cannot be collected at all.

B. Even if the Solicitor General's argument were cognizable in this Court, it would be misdirected. It is a factual argument peculiar to this case. If practical collection problems do exist as to the particular debtors here—and there is no evidence that they do—that would not be a reason to embrace the Government's anomalous statutory argument, which would apply perforce to all chapter 11 reorganizations.

Especially is that so because the problem of which the Government complains, if real, is one of its own making. The IRS in this case had fully satisfactory means of ensuring collection of whatever taxes are due. Having failed to take advantage of those practical opportunities, it cannot reasonably complain of the consequences.

Rule 2002(j) of the the Bankruptcy Rules requires the clerk of the bankruptcy court to notify the IRS of all stages of a title 11 proceeding. The IRS received such notice here (Pet. App. 30a). It was listed as a creditor (*id.*

at 30a) and received timely notice of the claim bar date (Bank App. B42). It filed numerous proofs of claim, which ultimately yielded it a distribution of approximately $2.3 million (Bankr. C.P. 1254). (Another IRS proof of claim, in the amount of $3.4 million for 1980 taxes, was filed nine months late and struck as untimely. Bank. App. B42-B48). The IRS received copies of the competing plans and disclosure statements—which clearly indicated that Miami Center was to be sold and the proceeds distributed to creditors—and it was notified of the confirmation hearing (Pet. App. 30a). Standard IRS procedures require its personnel to review all proposed reorganization plans.[41] As the bankruptcy court explicitly found, the IRS had ample opportunity "to object and be heard on the terms proposed in the plans * * * and to appeal from the order of confirmation" (Pet. App. 30a).

The IRS is no ordinary creditor; its claims are accorded deference in bankruptcy proceedings.[42] The IRS's concerns about collection would surely have received careful and responsive attention had they been timely raised. The IRS could have voiced, at the pre-confirmation hearing, whatever doubts it had about collectibility of the taxes at issue. It could have introduced evidence about the expected size of the debtors' tax liabilities and their respective abilities to pay—matters about which the Solicitor General now can only speculate. If the bankruptcy court were satisfied that these concerns had substance, appropriate measures (such as creation of a tax reserve within the liquidating trust) could have been implemented.

In the absence of such protective measures, the IRS could rightfully have objected to confirmation of the plan.

[41] Internal Revenue Manual § 57(13)5.3 (reprinted in Bank App. B27-B30).

[42] *See* 1 L. King, *Collier on Bankruptcy* ¶ 8.03 (15th ed. 1991). *See also United States v. Energy Resources Co.*, 110 S.Ct. 2139, 2142 (1990) (discussing priority and dischargeability of federal tax claims).

Any party may object if the plan is "likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor" (BC § 1129(a)(11)). Those circumstances would presumably exist if—as the Government asserts is true here—a plan leaves the reorganized debtors with substantial tax liabilities and insufficient assets to meet them. In addition, any governmental unit may object to a plan if its "principal purpose * * * is the avoidance of taxes" (BC § 1129(d)).[43]

Had the IRS presented its concerns when the plan was being considered for approval, its request would have avoided the abstract and rigid quality of its present attack on the bankruptcy court's approval of the plan. The Government's collection-based concerns would have been considered by the bankruptcy court in a concrete, fact-finding context. The actual tax liabilities of Gould and his multiple corporations could have been examined. Procedures could have been established to ensure full disclosure by the debtors of information necessary for the court to determine these matters. And, if modifications to the plan were judged appropriate, the creditors could have evaluated the

[43] Significantly, the IRS here was in a far better position than it would have occupied if the debtors had executed the same debt-reduction steps outside of bankruptcy court. Absent the chapter 11 proceeding, the debtors might have sold their real estate, used the proceeds to pay creditors, and filed timely tax returns without paying the taxes due. Lacking prior notice, the IRS then would have been limited to using its normal tax-collection tools after the tax returns were filed. Similarly, if the Bank had foreclosed on Miami Center, the IRS would not have been party to the foreclosure proceeding and would have had no claim against the proceeds of sale. In contrast, the debtors' bankruptcy petitions resulted in the IRS's receiving advance notice, ample opportunity to review the plan before confirmation, and the ability to seek its amendment with a view to assuring collection of any post-confirmation taxes. If the IRS faces collection difficulties today, those difficulties are directly traceable to its "serious procedural mistake" in failing timely to voice its concerns in this case. Sheppard, 51 Tax Notes 161 (Apr. 15, 1991).

plan, as modified, in light of the impact that any special tax arrangements had on their recovery.

Having failed to raise its collection-based objections in a timely fashion, the IRS now seeks to collect the debtors' taxes from funds that the plan of reorganization explicitly reserves for *other creditors*. If this mode of collection is permitted, it will have extremely unsettling effects on the bankruptcy process. That process is one of negotiation and compromise; the IRS should not be permitted to absent itself from the negotiating table and then demand a form of "super-priority" payment after the plan has been confirmed. Creditors' votes to confirm a plan are premised on the belief that it provides a fixed sum of money to meet their claims. If the IRS can sit on its hands and raid the pot after their votes are cast, bankruptcy reorganizations will be neither predictable nor just.

The Bankruptcy Code establishes clear procedures by which *all* creditors may protect their rights. The IRS neglected to follow those procedures. Whatever may explain the Government's failure to act in this case, it has not demonstrated, either legally or factually, the existence of a "loophole of troubling proportions" (U.S. Br. 13-14) that it could not, by itself, have closed through proper diligence.

Repeated use of the federal bankruptcy process has become common in our society, particularly in view of current economic conditions. To disentangle the competing claims of the different parties, a fair and practical regime must be followed which respects the orderliness and discipline mandated by the Bankruptcy Code. Respondents' interpretation of the relevant statutes not only meets this standard, but closely tracks this Court's emphasis on the need to keep in mind the "relevant periods [of the bankruptcy process] to be considered." *Nicholas v. United States*, 384 U.S. at 686.

Here we are dealing with the post-confirmation period of plan implementation, not the pre-confirmation period of

estate administration. And here we are dealing with an interim "liquidating trustee," appointed after confirmation, whose duties are limited to implementing the plan and returning to the reorganized debtors any assets remaining after creditors are paid. This case clearly does not involve a pre-confirmation statutory trustee who steps into management's shoes and exercises plenary power to manage the debtors' business.

Under these circumstances, the courts below correctly interpreted both the plan and the applicable statutes as not requiring the liquidating trustee to assume the post-confirmation tax responsibilities of the reorganized debtors.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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September 16, 1991

APPENDIX

APPENDIX

Non-Debtor Affiliates Related to the Debtors for Federal Income Tax Purposes

Source: Debtors' Schedules and Statements of Affairs (Bankruptcy Court Papers 275-278)

Affiliate	Debtor and Nature of Interest	Property/Business
1. Miami Center Joint Venture (Florida general partnership)	50% (Gould)	Development of vacant parcels in downtown Miami adjoining "Miami Center"
2. Eleven Dupont Circle Associates, District of Columbia Limited Partnership	0.295% (Gould) 29.205% (Holywell)	Office building at Eleven Dupont Circle
3. Dupont Land Associates, District of Columbia Limited Partnership	0.295% (Gould) 29.205% (Holywell)	Land at Eleven Dupont Circle
4. 1616 Reminc Limited Partnership, a Virginia Limited Partnership	0.004% (Gould) 0.396% (Holywell)	Arlington, Virginia Office Building
5. 1616 Arlington Associates, a Virginia Limited Partnership	0.03% (Gould) 29.7% (Holywell)	Arlington, Virginia Office Building

6. 1300 N. 17th Street Associates, a Virginia Limited Partnership	6.332% (Gould) 13.330% (Holywell)	Arlington, Virginia Office Building
7. Great Western Bank Building Limited Partnership	0.3% (Gould) 29.7% (Holywell)	Office Building
8. 1333 New Hampshire Associates	4.0% (Gould)	Office Building
9. Corpus Christi Associates	1.0% (Gould) 49.0% (Holywell)	Unknown
10. Parkwell, Inc.	100% (Holywell)	Parking Concession
11. Twin Development Corp.	100% (Holywell)	Corporate general partner for Washington, D.C. Partnership
12. Charleston Center Corp.	100% (Holywell)	Charleston, South Carolina development
13. Whitehall Security Corp.	100% (Holywell)	Security services
14. Holywell Leasing Company	100% (Holywell)	Equipment leasing
15. PBA, Inc.	100% (Holywell)	Architectural services
16. Holywell Management of Washington, D.C.	100% (Holywell)	Building management
17. Holywell Construction Company	100% (Holywell)	Construction

18. Orion Mechanical Services, Inc.	100% (Holywell)	Building engineering services
19. Studley-Holywell Associates, Inc.	50% (Holywell)	Brokerage
20. NHA Corporation	66.6% (Holywell)	Corporate general partner, Washington, D.C. Partnership
21. Whitehall Building Services, Inc.	100% (Holywell)	Building services
22. Parkwell of Florida, Inc.	100% (Holywell)	Parking concession (Florida)
23. Orion Engineering of Florida, Inc.	100% (Holywell)	Building engineering (Florida)
24. Holywell Telecommunications Co.	100% (Holywell)	Telecommunications equipment and services
25. Holywell Hotels, Inc.	100% (Holywell)	Hotel management
26. Holywell Management of Florida, Inc.	100% (Holywell)	Management services
27. Holywell Insurance Services, Inc.	100% (Holywell)	Insurance
28. Whitehall Security Corp. of Florida	100% (Holywell)	Security (Florida)
29. Orion Cleaning Services of Washington, Inc.	100% (Holywell)	Building maintenance

In The
Supreme Court of the United States
October Term, 1991

Holywell Corporation, *et al.*,
Petitioners
v.
Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust, *et al.*

United States of America,
Petitioner
v.
Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR RESPONDENT FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST

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September 1991

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

No. 90-1361

HOLYWELL CORPORATION, *et al.*,
Petitioners
v.

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, *et al.*

No. 90-1484

UNITED STATES OF AMERICA,
Petitioner
v.

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR RESPONDENT FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST

STATEMENT

The Parties

Petitioners are the United States and five debtors. The debtors are Theodore B. Gould ("Gould") and four entities controlled by him: two corporations, Holywell Corporation ("Holywell"), which is wholly owned by Gould, and Miami Center Corporation ("MCC"), a wholly owned subsidiary of Holywell; and two partnerships, Chopin As-

sociates, a partnership between Gould and MCC, and Miami Center Limited Partnership ("MCLP"), a partnership of Gould, Holywell, MCC, and certain limited partners. *See* Pet. App. 2a n.1. Holywell also had 19 nondebtor corporate subsidiaries with which it filed consolidated federal income tax returns, and Gould and Holywell were controlling partners of nine nondebtor partnerships. J.A. 30, 33-34, 37; *see also In re Holywell Corp.*, 118 Bankr. 876, 878 (S.D. Fla. 1990); Bankr. Adv. Proc. C.P. No. 1 (Adv. Proc. No. 88-0247), at 4-5.[1]

Respondents are the Bank of New York ("Bank"), which was the principal creditor of the debtors and the proponent of a chapter 11 plan of reorganization (the "Plan") that was confirmed on August 8, 1985 and became effective on October 10, 1985, and Fred Stanton Smith, a stranger to the affairs of the debtors who was appointed Trustee of the Miami Center Liquidating Trust (the "Liquidating Trustee") by the bankruptcy court pursuant to the Plan.

The Plan and Its Implementation

On August 22, 1984, the debtors, who listed more than $350 million in debts to over 400 creditors, filed simultaneous chapter 11 petitions in the United States Bankruptcy Court for the Southern District of Florida. *See Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1548 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988). Each debtor became a debtor in possession.

In December 1984 and January 1985, with the approval of the bankruptcy court, the debtors caused the sale of certain "Washington Properties." The gross proceeds from the sale, approximately $32 million, were deposited into bank accounts subject to court order. Bankr. C.P. No. 303.

[1] "Bankr. C.P." refers to the docketed court paper number in the Bankruptcy Court. "Bankr. Adv. Proc. C.P." refers to the docketed court paper number in the indicated adversary proceeding.

On February 27, 1985, the Bank filed a proposed plan of reorganization and a related disclosure statement. The centerpiece of the proposal was the prompt sale of the debtors' entire interest in a realty complex called Miami Center to the Bank pursuant to a contract attached to the proposed plan. It was anticipated that all allowed pre-petition and administrative claims, except for claims of the debtors and their affiliates, would be paid in full. *See* Pet. App. 30a; Bankr. C.P. No. 478 (Bank's Amended Consolidated Disclosure Statement), at 2. The plan did not deal with the payment of post-confirmation taxes, and the Bank's disclosure statement did not analyze the tax consequences of the proposed reorganization.[2]

The Internal Revenue Service ("IRS") was entitled by Bankruptcy Rule 2002(j) to notice of all stages of the proceedings. It had also filed proofs of federal tax claims not at issue in this case. It received notice of all pertinent matters, including the Bank's proposed plan and disclosure statement. The United States did not, however, object to the plan, or the disclosure statement, did not vote against the proposed plan, voiced no objection to confirmation, and did not appeal the order of confirmation. Pet. App. 30a; U.S. Br. 4 n.2. The debtors objected to the Bank's proposed plan primarily on grounds irrelevant to the present case, adding the one-sentence assertion that the plan would "create[] a new [tax] liability for these partners [in MCLP] of $10,560,000 of taxes,"

[2] See Pet. App. 42a *et seq.*; Bankr. C.P. No. 478.

The debtors filed five separate but virtually identical plans that also proposed using the proceeds from the sale of Miami Center to pay claims and made no provision for post-confirmation taxes. Their disclosure statements also provided no analysis of tax consequences, although two schedules to their statements made incidental references to federal taxes. *See* Bankr. C.P. No. 377, Schedule E; Bankr. C.P. No. 381, Schedule E. The bankruptcy court found (Pet. App. 29a-30a) that the debtors' plans had failed to disclose any tax liability arising from the sale of the Washington Properties or of Miami Center.

an assertion they later declined the bankruptcy court's invitation to explain.[3]

After "overwhelming" approval by the creditors, the bankruptcy court confirmed the Bank's proposed plan on August 8, 1985. Pet. App. 2a. The Plan did not, however, become effective until the expiration of a stay on October 10, 1985. The debtors thereafter unsuccessfully appealed the order of confirmation.[4]

The Plan provided for the creation of what it styled a "Liquidating Trust" and the appointment of a "Trustee." By order dated August 12, 1985, the court appointed respondent Smith, who had no prior connection with the debtors or the proceedings. Bankr. C.P. No. 916. Smith's authority to act became effective when the Order of Confirmation became effective on October 10, 1985.

The Plan called for the transfer to the Liquidating Trustee of "all property of the estates of the Debtors

[3] Bankr. C.P. No. 534 at 5 (emphasis omitted). At the hearing, in a passage misleadingly quoted by the debtors (Debtors Br. 4-5), the bankruptcy judge said he was a "babe in the woods" on tax matters and asked the *debtors'* then counsel, Mr. Kent, to provide an explanation of the "adverse tax consequences" the debtors were alleging and said he would honor a request to modify the Plan to alleviate any such consequences. Bank. Br. in Opp. B-49, B-50. The debtors made no response to the judge's plea.

[4] *Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), *dismissed as moot sub nom. Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988). The debtors' statement (Debtors Br. 7 n.9) that the confirmation order was "unequivocally reversed" is false. On a separate appeal from the confirmation order, brought by parties not before this Court on a claim-subordination issue not relevant to the present case, a different district court judge reversed the confirmation order in respect of the claim-subordination issue, noting as he did so the debtors' separate general appeal of the confirmation order and stating that the appeal before him was limited to the specific issues raised. *See Olympia & York Florida Equity Corp. v. Bank of New York*, No. 85-3230-CIV-ATKINS, slip op. at 3 (S.D. Fla. Mar. 24, 1987), *aff'd*, 913 F.2d 873 (11th Cir. 1990).

within the meaning of § 541(a) of the [Bankruptcy] Code," J.A. 41, and it purported to give the Liquidating Trustee broad powers with respect to the assets delivered to him. *Id.* at 41-43. However, these assets consisted primarily of (i) cash from the sale of the Washington Properties, (ii) Miami Center, and (iii) stock interests in nondebtor affiliates, control of which has been a matter of dispute as described below. Since the Plan directed the prompt sale of Miami Center to the Bank pursuant to a contract attached to the Plan, *see id.* at 39, 40, the Trustee's actual holdings have since his first day in office consisted primarily of cash, and his real task, as understood by himself and all the parties, has been to pay claims in accordance with the detailed prescription set forth in Article VI of the Plan (*id.* at 45-47) and related schedules and the court's instructions. That is why, despite the apparent breadth of his nominal powers, the three courts below found that the Liquidating Trustee was essentially a "disbursing agent," with "ministerial" duties. Pet. App. 11a, 24a, 32a-33a.

The Trustee followed the Plan and the court's orders. He completed the sale of Miami Center on his first day in office, October 10, 1985. As required by the Plan, the property was sold to the Bank for $255,600,000; the consideration took the form of cancellation of the Bank's claim (approximately $242,000,000 including interest) plus cash (approximately $13,600,000 minus certain adjustments). Shortly thereafter, the Trustee made distributions in full payment of over 90% of allowed claims of unaffiliated creditors, including a cash distribution to the IRS. Bankr. C.P. No. 1254 (Second Report of the Liquidating Trustee). Every distribution (and every other payment) made by the Liquidating Trustee was either explicitly directed by the Plan or made pursuant to an order of the bankruptcy court. The United States did not object to any of these payments at any time before the decision of the bankruptcy court in the present proceeding.

The Separate Life of the Reorganized Debtors

The Plan "created the trust solely to pay the debtors' indebtedness in a manner specified by the plan" (Pet. App. 32a) and assumed that after confirmation the individual and corporate debtors would conduct their own affairs. It specifically directed the Liquidating Trustee to "[t]ake no action that would change the business of any of the Debtors as conducted at or prior to the filing of the [Chapter 11] petitions" (J.A. 43), and it granted the Trustee access to their records only "regarding objections to claims against the estate with a view toward the prompt determination of said objections and a prompt consummation of the Plan." *Id.* at 50. Gould and the two corporate debtors, Holywell and MCC, have asserted their independence vigorously: [5]

[5] In addition to the matters described in the text, the debtors have battled for title to and possession of various other pre-confirmation assets of the debtors and their nonbankrupt subsidiaries. For example, on January 23, 1986, the debtors filed an emergency motion for clarification of their right to the proceeds of the sale of the Washington Properties. The bankruptcy court, the district court, and the Eleventh Circuit rejected this claim (*Holywell Corp. v. Bank of New York*, No. 86-0848, slip op. (S.D. Fla. Feb. 20, 1987), *aff'd sub nom. Holywell Corp. v. Smith*, No. 87-5195, slip op. (11th Cir. Mar. 18, 1988)), and this Court denied certiorari. No. 88-80, *cert. denied*, 488 U.S. 850 (1988). (That is not the debtors' only previous visit to this Court. *See* Nos. 87-1988, *cert. denied*, 488 U.S. 823 (1988); 87-1989, *pet. for writ of mandamus denied*, 488 U.S. 814 (1988); 89-864, *cert. denied*, 110 S. Ct. 867 (1990); 89-708, *cert. denied*, 110 S. Ct. 725 (1990); 89-917, *cert. denied*, 110 S. Ct. 1119 (1990); 90-676, *cert. denied*, 111 S. Ct. 713 (1991); 90-761, *cert. denied*, 111 S. Ct. 767 (1991); 90-1551, *cert. denied*, 111 S. Ct. 2259 (1991).)

Gould also contested a determination that the Liquidating Trustee, and not he, was entitled to a sum certain arising out of a settlement with one of his most substantial pre-bankruptcy creditors. *See In re Holywell Corp.*, 913 F.2d 873 (11th Cir. 1990).

In June 1989, Gould was cited for contempt for selling, over the Liquidating Trustee's objections and the bankruptcy court orders to the contrary, certain concrete pumps and related equipment that had belonged to the debtors, refusing to reveal the whereabouts of the proceeds, and refusing to turn the proceeds over to the Liquidating Trustee. *Gould v. Smith*, No. 89-2629-CIV-MARCUS, slip op. at 2-3 (S.D. Fla. May 17, 1991).

(i) The debtors have continuously refused, despite bankruptcy court orders, to produce for the Trustee (a) any financial records of their wholly owned subsidiaries or (b) the "records of their own post-confirmation financial transactions." *In re Holywell Corp.*, 118 Bankr. at 878. The refusal to produce these records was sustained by the district court in 1990. *Id.* at 881.[6]

(ii) In 1987, Gould caused five of Holywell's wholly owned subsidaries (headed by Gould as president) *each* to file a lawsuit against respondent Smith alleging, *inter alia*, that Holywell, not the Liquidating Trustee, owned the stock of Holywell's non-debtor subsidiaries and was entitled to control them.[7] The complaint in one of these cases, *Twin Development Corp. v. Smith*, No. 87-0037 (W.D. Va.), filed on August 7, 1987, nearly two years after the order of confirmation, is set forth in full in Respondents' Supplemental Appendix attached to this brief. The complaint, verified by Gould, described the case as a "suit to quiet title" and alleged that Twin

[6] One aspect of this proceeding was that Gould refused to account for approximately $485,000 from a settlement entered into by Holywell Telecommunications Corporation, a wholly owned subsidiary of Holywell. In 1988, the Liquidating Trustee filed an adversary proceeding to require Gould to provide such accounting. Bankr. Adv. Proc. C.P. No. 1 (Adv. Proc. No. 88-0247), at 6-7. The bankruptcy court entered default judgment for failure to produce financial records, but the district court vacated and remanded for a further evidentiary hearing, which has not been held. *In re Holywell Corp.*, 118 Bankr. 876 (S.D. Fla. 1990).

[7] *See Twin Dev. Corp. v. Smith*, No. 87-0037, slip op. (W.D. Va. Nov. 15, 1988); *Whitehall Sec. Corp. v. Smith*, No. 88-0016-C, slip op. (W.D. Va. May 3, 1990); *Orion Cleaning Servs., Inc. v. Smith*, No. 88-0022, slip op. (W.D. Va. May 3, 1990); *Orion Mechanical Servs., Inc. v. Smith*, No. 88-0021-C, slip op. (W.D. Va. May 3, 1990); *Holywell Management, Inc. v. Smith*, No. 88-0023-C, slip op. (W.D. Va. May 3, 1990).

Development and Holywell's wholly owned other nonbankrupt subsidiaries were "never under the jurisdiction of the Bankruptcy Court and never part of the Debtors' bankrupt estates" (R.S.A. 3a). It further alleged that "[u]nder the Bankruptcy Code, the ownership of the [subsidiaries' stock] reverted to Holywell Corporation, outside the jurisdiction of the Bankruptcy Court, upon confirmation of the Plan of Reorganization entered on August 8, 1985." *Id.* at 4a. It sought to enjoin respondent Smith "from asserting any right or claim to the stock or assets of Twin Development Corporation or the other subsidiaries." *Id.* at 6a.[8] The Virginia district court ultimately ruled in the Liquidating Trustee's favor on November 15, 1988 (6½ months after the bankruptcy court's ruling in the present case). Undeterred, Gould dissolved Twin effective May 16, 1990 without advising the Liquidating Trustee, seeking his consent, or accounting to him for the proceeds of dissolution.

(iii) The debtors insisted, long after the Liquidating Trustee took office, that the filing of their tax returns was their responsibility, not the Trustee's responsibility. Apparently based on advice of the debtors' accountants, Touche Ross & Co., *see* J.A. 159, Gould wrote to counsel for the Liquidating Trustee on Holywell letterhead on March 11, 1987, stating,

> Since the Miami Center Liquidating Trust is not a taxable entity, the interest earned on the funds deposited by the Liquidating Trustee . . . has been

[8] The 1987 complaint also made other allegations wholly inconsistent with petitioners' position in this Court. It alleged that the Plan "provided for the appointment of a liquidating trustee (not a Bankruptcy Trustee, as defined in the United States Bankruptcy Code)," R.S.A. 2a, that the "liquidating trustee . . . not being a Bankruptcy Trustee, is not an officer of the court," *id.* at 3a, and that a "liquidating trustee not appointed as a Bankruptcy Trustee under 11 U.S.C. 1104, but purporting to exercise the sweeping powers reflected in the allegations [of the complaint], is not authorized by the Bankruptcy Code." *Id.* at 4a.

> reported as taxable income in 1985. . . . The taxable interest income has been segregated to the accounts of Twin Development Corporation, Holywell Corporation, the Miami Center Limited Partnership, and myself. The interest income for 1986 will also be reported separately by each of the above taxable entities.

Id. at 161. On March 19, 1987, Edgar Schumacher, Holywell's chief financial officer, wrote to the Liquidating Trustee stating that "we believe" the Trust "does not" have a responsibility to file tax returns and stating (apparently mistakenly, since no return had then been filed) that "the Debtors, as the appropriate taxable entities, have filed tax returns including the 1985 interest income earned." *Id.* at 164-165. On April 29, 1987, the debtors' accountant, Clifford Benson of Touche Ross, wrote to the Liquidating Trustee and advised that he was preparing Holywell's 1985 and 1986 tax returns. *Id.* at 166. And on January 4, 1988, Holywell in fact filed a consolidated tax return for its fiscal year ending July 31, 1985, a return the United States now claims should have been filed by the Trustee.[9]

Proceedings Below

On December 27, 1987, the Liquidating Trustee initiated the present proceedings by filing an adversary complaint in the bankruptcy court. The complaint, which named the debtors, the Bank, and the United States, contended in relevant part that the debtors, not the Liquidating Trustee, were responsible for filing tax re-

[9] That Holywell return reported gain from sale of the Washington Properties. A 1985 partnership information return for Miami Center Limited Partnership was prepared by Touche Ross & Co. and filed in October 1986. That return reported the partnership's gain on sale of the Miami Center and in attached K-1s reported the share of income, credits and deductions of each partner, including Gould, Holywell and MCC.

turns for post-confirmation periods and paying any tax due.[10]

At trial, the debtors and the United States both unequivocally conceded that the "Liquidating Trust is not a taxable entity." J.A. 97, *see also id.* at 104-105. The United States proffered no testimony and no other evidence or exhibits except the Plan and contended only that the Trustee was responsible for filing returns for the debtor corporations pursuant to 26 U.S.C. § 6012(b)(3) and for Gould's bankruptcy estate under 26 U.S.C. § 6012(b)(4) and, as a result, responsible under 26 U.S.C. § 6151 for paying taxes, which were alleged to be "an expense of administration of the trust." *Id.* at 94-95. No one contended at trial or has contended at any time since that the Liquidating Trust was a trust taxable as a separate entity under Subchapter J of the Internal Revenue Code.

The debtors also conceded at trial that they were *not* contending that "Mr. Smith operates Holywell Corporation . . . . He is a non-operating trustee and a fiduciary." *Id.* at 99. The uncontroverted evidence established that the Liquidating Trustee never operated any of the debtors' businesses and that his function had been to hold a fund of money and pay allowed claims against the debtors. *Id.* at 124.

The bankruptcy court (Weaver, J., who had replaced Bankruptcy Judge Britton, who confirmed the Plan) ruled that the Liquidating Trustee had no responsibility to file federal income tax returns or pay any tax due after confirmation of the Plan. Pet. App. 28a-37a. The court

[10] Nothing in the record, and no materials in the possession of the Liquidating Trustee, enable the Trustee to compute the amount of the debtors' federal income tax liability, if any, for any relevant period. The estimate of tax liability in n.4 of the U.S. Brief is based on alleged tentative computations that are not of record in this or any other case, not judicially noticeable, and wholly unavailable to respondents. The Court should disregard this material. *Cf. Harmelin v. Michigan*, 111 S. Ct. 337 (1990).

stated that "[t]he government received copies of the competing plans and disclosure statements; had an opportunity to object and be heard on the terms proposed in the plans; and to appeal from the order of confirmation which contained no provision for payment of capital gain taxes. The government did none of these things." *Id.* at 30a. The court noted that it was "conceded by the government and the debtors [that] the trust is not a taxable entity." *Id.*

The bankruptcy court held that 26 U.S.C. § 6012(b)(3) did not apply because

> the liquidating trustee is not a trustee appointed in a case under title 11. The liquidating trustee was appointed by the court as part of a confirmed plan of reorganization and his actions are limited to the powers granted to him in the plan and the order of confirmation. The plan created the trust solely to pay the debtors' indebtedness in a manner specified by the plan.

Id. at 32a.[11] The court then found that the Liquidating Trustee is not an "assignee" or a "fiduciary" because he

> does not possess discretionary authority as to the disposition of . . . assets. The liquidating trustee is merely charged with the responsibility of identifying, quantifying and paying allowed claims through the disbursement of the trust assets in accordance with the terms of the confirmed plan. The liquidating trustee's functions are more closely analogous to

[11] The lower courts are the object of a good deal of petitioners' scorn (U.S. Br. 27-29; Debtors Br. 8-10) for having applied to respondent Smith the term "contract trustee," but the distinction between a "trustee in a case under title 11," who must be appointed *prior to* confirmation, *see* 11 U.S.C. § 1104(a) and *infra* p. 26, and a trustee appointed pursuant to a confirmed plan of reorganization to perform specified tasks *after* confirmation is recognized in the Bankruptcy Code itself, *see* 11 U.S.C. § 1123(a)(7), and is entirely valid.

those of a disbursing agent than to an assignee or fiduciary . . . .

Id. at 32a-33a.[12] The court therefore rejected the contention that Section 6012 applied to the Liquidating Trustee, and, since the only basis alleged for requiring the Liquidating Trustee to pay any tax was the responsibility of a return-filer under 26 U.S.C. § 6151, the court ruled that the Liquidating Trustee had no payment obligation. *Id.* at 37a.[13]

Petitioners challenge (U.S. Br. 29; Debtors Br. 5-6) the bankruptcy court's finding that the Liquidating Trustee's actual function was "to pay the debtors' indebtedness in a manner specified by the plan." Pet. App. 32a. They cite the boilerplate language of the Plan, which does, indeed, set forth powers of no apparent usefulness to a person whose actual function is to hold and disburse a sum of money. But the debtors conceded at trial that respondent Smith did not operate Holywell, J.A. 99, and the bankruptcy court's finding after trial was accepted by two courts on review and should not be open to dispute in this Court. *E.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

Petitioners appealed to the district court and sought a stay barring the Liquidating Trustee from making any further payments to creditors. Resp. Br. in Opp. 8a-9a. A stay was initially granted and then vacated after the

[12] The court also noted that "there was no assignment of the debtors' properties except as provided in the plan." Pet. App. 32a-33a. That is, the Plan purported to transfer only the properties of the estates and not to give the Liquidating Trustee any rights in property, or income, that the debtors might generate from post-confirmation activities.

[13] The court therefore did not reach the Liquidating Trustee's contingent allegation that the Bank should be held liable for any tax payment for which he was determined to be responsible.

district court affirmed. Petitioners then sought a stay from the court of appeals, which was granted but which expired when that court, too, affirmed. *Id.* at 10a-11a. The debtors, but not the government, requested a further stay, which was denied by Justice Kennedy. *Id.* at 15a. After the expiration of the stay, the Liquidating Trustee made certain further payments to creditors pursuant to court order. *See* Bankr. C.P. Nos. 2168, 2170, 2173, 2215, 2216.

The district court affirmed the bankruptcy court in all respects. Pet. App. 17a-27a. It also rejected a claim, not renewed in this Court, that the Plan itself somehow required the Liquidating Trustee to pay the debtors' post-confirmation taxes. *Id.* at 21a-23a. The court specifically affirmed the finding that the Liquidating Trustee had "limited and essentially ministerial functions," that he was not a "trustee in a case under title 11," and that his nondiscretionary duties were "more akin to those of a disbursing agent, rather than an assignee or fiduciary." *Id.* at 23a-24a.

The Eleventh Circuit affirmed, Judge Cox dissenting. It held that the Liquidating Trustee "was not required by the provisions of a confirmed amended Plan of Reorganization . . . nor by statutory provisions to file tax returns." *Id.* at 2a. The court said, "First, we conclude that the liquidating trustee is not a trustee under Title 11, but rather a contract trustee performing limited and essentially ministerial duties. Second, we agree that the liquidating trustee's non-discretionary duties of distributing the trust property in accordance with the Plan make him similar to a disbursing agent rather than an assignee or fiduciary." *Id.* at 11a-12a.

SUMMARY OF ARGUMENT

The central question in this case is whether the Liquidating Trustee is required (a) by Section 6012(b)(4) of the Internal Revenue Code to file federal income tax returns as the fiduciary of the "estate of an individual [i.e., petitioner Gould] under chapter . . . 11" or (b) by Section 6012(b)(3) to file federal income tax returns for the corporate petitioners, Holywell and MCC. The three courts below correctly held that he is not.

Section 6012(b)(4) has no possible application to this case, and nothing in the Internal Revenue Code requires the Liquidating Trustee to file on behalf of Gould or any related "estate." Section 6012(b)(4) provides for the filing of returns by fiduciaries for three types of entities: an "estate," a "trust," and an "estate of an individual under chapter 7 or 11." No "estate" is involved in this case: Gould is alive. No taxable "trust" is involved in this case: all petitioners explicitly conceded at trial that the Liquidating Trust "is not a taxable entity" (J.A. 97; *id.* at 105), and the bankruptcy court accepted this concession. Pet. App. 30a. And although there was an "estate of an individual under chapter . . . 11" between the filing of the petition and the date of confirmation of the Plan, the petitioner debtors correctly conceded that this bankruptcy estate "terminated in this case upon confirmation of the Plan of Reorganization." Br. 30 n.34. As long as that estate existed, Gould himself, as debtor in possession, was its fiduciary. The Liquidating Trustee never had any relationship to that estate, fiduciary or otherwise.

Section 6012(b)(3) imposes the obligation to file a return for a corporation on a person who has *displaced* that corporation's management. It grew out of a case, *United States v. Whitridge*, 231 U.S. 144 (1913), in which there had been an "ouster" of management, and it has been interpreted since the beginning to apply to persons who "stand[] in the place" of the corporate officers. U.S. Br. 16 (quoting Treas. Reg. 45, Art. 622 (1919)). This

Court has read the section to require "complete control" of the properties and business of the corporation, *North American Oil Consolidated v. Burnet*, 286 U.S. 417, 423 (1932), recognizing that the filing responsibility should be transferred only to a person who is in a position to file a complete return. *Id.*

In particular, Section 6012(b)(3) uses the term "trustee in a case under title 11" (the Bankruptcy Code's replacement for the old term "trustee in bankruptcy"), a term of art used consistently throughout the Bankruptcy Code and in the Internal Revenue Code to refer to a person appointed "before confirmation of a plan" (11 U.S.C. § 1104), who acts as "the representative of the estate" (11 U.S.C. § 323(a)) and "assumes control of the business [at which point] the debtor's directors are completely ousted." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352-53 (1985) (quotation and footnote omitted). The term "receiver," concededly (U.S. Pet. 16 n.12) not descriptive of the Liquidating Trustee, and the term "assignee" have been applied in the context of Section 6012(b)(3) only to persons who in fact fully succeeded to the management of the corporation's affairs.

Respondent Smith is not a "trustee in a case under title 11," does not otherwise "stand in the place" of the management of Holywell and MCC, and is not in a position to file Holywell's consolidated returns. All five debtors were debtors in possession, in effect serving as their own trustees (*see* 11 U.S.C. § 1107), until confirmation. The Liquidating Trustee was appointed after confirmation "solely to pay the debtors' indebtedness in a manner specified in the plan" (Pet. App. 32a), not to manage the debtors' post-confirmation affairs. He was neither the "representative of the estates," which terminated before his appointment, nor a surrogate for the management of the reorganized corporations, a role from which he was explicitly excluded.

The reorganized corporate debtors, whose post-confirmation returns are at issue, have their own vigorous management, which has not in any sense been displaced by the Liquidating Trustee. The Plan instructed him not to "change the business of any of the Debtors" (J.A. 43) and granted him access to their records only with regard to "objections to claims" (*id.* at 50), and he has been denied all post-confirmation records of the corporate debtors and all records of every kind of the 19 nondebtor subsidiaries that were part of Holywell's consolidated return group. See *supra* p. 7. He is not in a position in which he could responsibly file the Holywell group's consolidated post-confirmation tax returns—which is no doubt why Gould and Holywell took the position well into 1987 that they, not the Liquidating Trustee, were responsible for such filings and in 1988 actually did file the return for the year ended July 31, 1985 that the United States now says the Liquidating Trustee should have filed.

31 U.S.C. § 3713 and 28 U.S.C. § 960, which were not pressed on the courts below and are not relied on in this Court by the United States, have no bearing on the question presented. Section 3713 "does not apply to a case under title 11" (31 U.S.C. § 3713(a)(2)) whether or not a trustee is involved; this is plainly such a "case." Section 960 does not impose any federal tax filing or payment obligations of its own force. Its "obvious purpose was to negative the idea that a federal receiver or trustee could ignore [otherwise applicable] rules of law." *Palmer v. Webster & Atlas Nat'l Bank*, 312 U.S. 156, 166 (1941). The Liquidating Trustee claims no such immunity.

More generally, there is no basis for the petitioner debtors' suggestion that respondent Smith may somehow be personally liable for their taxes. With respect to 26 U.S.C. § 6151, this Court has disposed of any such contention with winged words: "Nothing in § 6151 . . . imposes any obligation on the trustee other than in his capacity as the representative of the bankrupt estate."

Nicholas v. United States, 384 U.S. 678, 694 n.28 (1966). The Liquidating Trustee, who was a stranger to the debtors and to the proceedings until he was appointed pursuant to the confirmed Plan, has carried out his duties in good faith in accordance with the Plan and the bankruptcy court's orders. He is not responsible, in the slightest degree, for any inability of the debtors to pay, or the United States to collect, their taxes.

The contention of the United States that the decision below creates a "loophole" is mislabeled and without merit. This case does not concern any reduction in the amount of tax liability of any taxpayer. What the United States is really arguing is that in the unique circumstances of this case it may now have a collection problem, but that problem, if any, is of its own making: the United States failed to make any objection whatever to a Plan that called for (i) the prompt sale of the debtor's principal asset for a substantial "amount realized" for tax purposes but very little cash, and (ii) the prompt distribution of much of that cash, without any provision for post-confirmation tax payments. Those steps could have been proposed, adopted, and carried out without the use of a "Liquidating Trustee" or any other person who could conceivably have any obligations under Section 6012(b). The collection problem, if any, stems not at all from the interpretation of Section 6012(b) or the Trustee's performance: it stems from the structural components of a Plan to which the United States made no objection.

Finally, the debtors' assumption that the tax burden "should" be borne by the Liquidating Trustee rather than themselves is entirely wrong. Gain on a sale of their principal asset to their principal creditor is *their* income, and any related tax ought properly to be borne by them, not by their various creditors in the form of a reduction in the recoveries to which those creditors are entitled. The debtors' notion that their tax liabilities must necessarily have followed their assets is neither logical nor warranted by the provisions at issue.

ARGUMENT

I. SECTION 6012(b) DOES NOT REQUIRE THE LIQUIDATING TRUSTEE TO FILE FEDERAL INCOME TAX RETURNS.

Petitioners contend that Section 6012(b)(4) requires the Liquidating Trustee to file federal income tax returns of the "estate of an individual [*i.e.*, petitioner Gould] under chapter . . . 11," or in some other manner to file returns on Gould's behalf, and that Section 6012(b)(3) requires the Liquidating Trustee to file federal income tax returns for the corporate petitioners. Both contentions are wrong:

(a) The Liquidating Trustee cannot be, or have been, a "fiduciary" for the "estate of an individual" because, as petitioner debtors concede, the "estate of an individual" terminated before the Liquidating Trustee took office. There is no other basis for requiring the Liquidating Trustee to file returns relating to Gould.

(b) The Liquidating Trustee is not required by Section 6012(b)(3) to file returns for the corporate debtors, because he was not a "trustee in a case under title 11" within the meaning of that phrase as used in both the Bankruptcy Code and the Internal Revenue Code, nor (as the courts below properly found) did he "stand[] in the place of the corporate officers." U.S. Br. 16 (quoting Treas. Reg. 45, Art. 622 (1919)).

A. Section 6012(b)(4) Does Not Require the Trustee to File Federal Income Tax Returns for the "Estate of an Individual Under Chapter . . . 11" or Otherwise to File on Behalf of Gould.

Section 6012(b)(4) of the Internal Revenue Code provides as follows:

> (4) Returns of Estates and Trusts.—Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

This section requires fiduciaries to file returns for three categories of taxable entities: "estate[s]," "trust[s]," and "an estate of an individual under chapter 7 or 11." No "estate" is involved here: petitioner Gould is a very much alive discharged debtor. No taxable "trust" is involved here: all petitioners conceded at trial that the Liquidating Trust "is not a taxable entity" (J.A. 97; *see also id.* at 105), and the bankruptcy court accepted this concession (Pet. App. 30a).[14] Nor was there an "estate of an individual" for which the Liquidating Trustee acted in any capacity, because as petitioner debtors concede (Debtors Br. 30 n.34), this entity terminated before the Liquidating Trustee took office.

"[E]state of an individual under chapter . . . 11" is a technical tax term. As the U.S. Brief explains (at 32), "When an individual files for relief in bankruptcy court . . . a separate taxable entity, the debtor's estate, is created. 26 U.S.C. § 1398."[15] The individual debtor and

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[14] This concession was correct. If the Liquidating Trust is a trust at all, it is a grantor trust, as the bankruptcy court, Pet. App. 33a, and the district court, Pet. App. 24a-25a, ruled, since the assets of the Liquidating Trust are used to discharge legal obligations of the debtors. Treas. Reg. § 1.677(a)-1(d); *see Stockton v. United States*, 335 F. Supp. 984 (C.D. Cal. 1971); *In re Sonner*, 53 Bankr. 859 (Bankr. E.D. Va. 1985). It could also be argued that the Liquidating Trust is simply an agency arrangement and not a trust at all for federal income tax purposes, since it was not created "for the purpose of protecting or conserving [a trust *res*] for the beneficiaries under the ordinary rules applied in chancery or probate courts," Treas. Reg. § 301.7701-4(a), but for the opposite purpose of prompt distribution of the cash to creditors, *see Munger v. Commissioner*, 16 B.T.A. 168, 176 (1929) (reviewed), *acq.* VIII-2 C.B. 37, and because the Liquidating Trustee had only limited and ministerial duties. *See* Rev. Rul. 71-119, 1971-1 C.B. 163 (special master with powers to determine proofs of claims for settlement fund was not a fiduciary of a taxable trust); *In re Alan Wood Steel Co.*, 7 Bankr. 697, 701 (Bankr. E.D. Pa. 1980) (disbursing agent is not fiduciary because he lacks the powers or duties of a fiduciary).

[15] As the United States also notes, the rule is different for corporations: no new taxable entity is created (*see* 26 U.S.C. § 1399).

the estate in bankruptcy are required to file separate federal income tax returns. It is the estate (not Gould individually) whose tax returns petitioners claim should have been filed by the Liquidating Trustee. But that is wrong. Upon his bankruptcy filing in 1984, Gould became debtor in possession of his bankruptcy estate and remained such for the entire period the estate existed; for all of the time that there was a separate estate in bankruptcy, Gould himself was the "fiduciary" and was required to file its federal income tax returns (as well as his own individual returns).[16]

As petitioner debtors concede, the "'estate of an individual under Chapter 11' terminated in this case upon confirmation of the Plan of Reorganization." Debtors Br. 30 n.34.[17] Since confirmation preceded the Liquidating Trustee's appointment, there was no separate "estate" during any period in which the Liquidating Trustee served; and he plainly cannot have been a "fiduciary" for an entity that terminated before his appointment.

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[16] Section 1398 states that the tax on the estate of an individual under chapter 7 or 11 "shall be paid by the trustee." 26 U.S.C. § 1398(c). The reference is to a statutory trustee appointed under chapter 7 or 11 of the Bankruptcy Code as a representative of the estate displacing the debtor. *See* S. Rep. No. 1035, 96th Cong., 2d Sess. 30 (1980) (Bankruptcy Tax Act of 1980). *See also infra* pp. 26-27. Under 11 U.S.C. § 1107, if no statutory trustee has been appointed, the debtor in possession (as the substitute for the trustee) has that responsibility.

[17] Petitioners' concession is correct. Section 1141(b) of the Bankruptcy Code, 11 U.S.C. § 1141(b), provides that, except as otherwise provided in the plan of reorganization or the confirmation order, "the confirmation of a plan vests all of the property of the estate in the debtor." It is settled law that application of section 1141(b) terminates the "estate of the debtor." *E.g., Abbott v. Blackwelder Furniture Co.*, 33 Bankr. 399, 402 (W.D.N.C. 1983); *In re Westholt Mfg. Inc.*, 20 Bankr. 368 (Bankr. D. Kan. 1982), *aff'd sub nom. United States v. Redmond*, 36 Bankr. 932, 934 (D. Kan. 1984). Such a termination occurs regardless of the extent to which property is returned to the debtor. *In re Sonner*, 53 Bankr. at 864.

Petitioner debtors seek to circumvent what Section 6012(b)(4) actually says by first asserting, without citation, that "the clear purpose of the statute is to bring within its scope all situations where persons control substantially all of the assets of another" (Debtors Br. 30 n.34) and then arguing that the Liquidating Trustee should not be "permitted to escape that broad purpose because he was appointed after administration of the estate terminated." *Id.* But Section 6012(b)(4) makes no reference to control of assets and has no such "broad purpose." [18] Neither Section 6012(b)(4) nor any other applicable section shifts the responsibility for filing returns for an *individual* to another person on account of control of assets.[19] Section 6012(b)(4) sets forth specific return filing requirements for three types of taxable entities, none of which existed when or after the Liquidating Trustee was appointed.[20]

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[18] Petitioner debtors also contend that the Liquidating Trustee was a trustee of a "trust" for the estate of petitioner Gould. Debtors Br. 30. At best, this is an attempt to escape (sub silentio) the unqualified and repeated concession, made by Gould himself and explicitly concurred in by the United States and adopted by the bankruptcy court and unchallenged through the district court and court of appeals, that no separate taxable entity was created by the Plan. *See supra* p. 10. That concession was correct. *See supra* n.14. In any event, petitioners should not be allowed to withdraw it in their merits brief in this Court. *See Steagald v. United States*, 451 U.S. 204, 209-10 (1981) (party may lose its right to raise issues when it has acquiesced in contrary findings); *cf. Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) (Court will not address issue not raised below).

[19] Section 6012(b)(2), which has no application here, provides that in the case of an individual under a disability, the duly authorized agent, committee, guardian, fiduciary or other person charged with the care of the person or property of the individual shall file the return, except that a receiver is not required to file a return if he has only part of the property of the individual.

[20] Contrary to the arguments in petitioners' briefs, *In re Bentley*, 916 F.2d 431 (8th Cir. 1990), and *In re Joplin*, 882 F.2d 1507 (10th Cir. 1989), both concern statutory trustees of ongoing "estates of individuals" and have no bearing on the obligations of the Liquidating Trustee here.

B. Section 6012(b)(3) Does Not Require the Trustee to File Federal Income Tax Returns for the Corporate Debtors.

Section 6012(b)(3) provides that in certain situations persons other than a corporation's own management are responsible for filing federal income tax returns "for such corporation." There are two corporate debtors involved in this case—Holywell and its wholly owned subsidiary MCC—and the issue under Section 6012(b)(3) is whether *their* corporate federal income tax returns due after October 10, 1985 should have been filed by their own management (as management contended until late in 1987) or by the Liquidating Trustee.

Although no petitioner mentions this, the first returns at issue are consolidated returns to be filed by Holywell as parent of an affiliated group of corporations. That group includes MCC, Twin (a nondebtor subsidiary that realized a substantial part of the gain on the sale of the Washington Properties), and other surviving nondebtor subsidiaries, which under Treas. Reg. § 1.1502-6(a) are severally liable for any tax due.[21] Although the Liquidating Trustee's inability to file accurate consolidated returns or reach the assets of the nondebtor subsidiaries for purposes of paying their share of the tax due is by no means the only reason why filing is not his responsibility, we note that the Liquidating Trustee has been successfully denied all financial information concerning the nondebtor subsidiaries (*see supra* p. 7), does not even know which subsidiaries must be included for which period, and has been denied access to the assets of the nondebtor subsidiaries (*see supra* n.6).

[21] In 1988, Holywell filed a consolidated return for the year ending July 31, 1985 (which the United States now claims should have been filed by the Liquidating Trustee) on behalf of itself and 20 affiliated corporations. Treas. Reg. § 1.1502-75(a)(2) provides that an affiliated group filing a consolidated return generally must file consolidated returns in subsequent years, which means that a consolidated return is also required for at least the fiscal year ending July 31, 1986. Whether the returns for later years were required to be consolidated would depend on the effect of confirmation and implementation of the Plan.

We demonstrate in point 1 that Section 6012(b)(3) transfers corporate return-filing responsibility only to persons who "stand in the place" of corporate management: the purpose of the section is to assure that corporate returns are filed by the persons in charge of the corporation's affairs and in possession of its records. We then show in point 2 that the courts below correctly concluded that the Liquidating Trustee's function was to disburse funds in payment of claims and that the facts demonstrate overwhelmingly that he never "stood in the place" of management of Holywell and MCC. In point 3 we show that an analogous statutory provision makes it clear that corporate returns should not be filed by a person who, like the Liquidating Trustee, has insufficient knowledge of the affairs of the taxpayers.

1. Section 6012(b)(3) transfers the responsibility for filing a corporation's federal income tax returns from its management to another person only where the other person "stands in the place" of management.

Since Section 13(c) of the Revenue Act of 1916, ch. 463, 39 Stat. 756, 771,[22] the first predecessor of Section

[22] Section 13(c) provided as follows:

> In cases wherein receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations . . . subject to tax imposed by this title, such receivers, trustees, or assignees shall make returns of net income as and for such corporations, . . . in the same manner and form as such organizations are hereinbefore required to make returns, and any income tax due on the basis of such returns made by receivers, trustees, or assignees shall be assessed and collected in the same manner as if assessed directly against the organizations of whose businesses or properties they have custody and control.

This provision began by referring to persons who "are operating the property or business." That phrase has been eliminated so as to make clear that there need not be an active business, *see infra* p. 30 n.28, but the section continues to apply, as that phrase made

6012(b)(3), the purpose of the section has been to transfer return-filing responsibility for a corporation to persons who *displace* corporate management. The provision was enacted in response to *United States v. Whitridge*, 231 U.S. 144 (1913), in which this Court held that receivers operating a rail system after "an ouster of corporate management," were not obliged to file corporate returns. *Id.* at 149. Congress enacted the predecessor of Section 6012(b)(3) so that in the case of such an ouster the successor to corporate management would be responsible for filing a corporate return.

Section 13(c) was followed by § 239 of the Revenue Act of 1918, ch. 18, 40 Stat. 1057, 1081, and several subsequent enactments containing virtually identical language.[23] Its meaning was made clear by Treasury interpretations beginning with the interpretation of the 1918 Act:

> Receivers, trustees in dissolution, trustees in bankruptcy, and assignees . . . *stand*[] *in the place* of the corporate officers and [are] required to perform all the duties and assume all the liabilities which would devolve upon the officers of the corporation were they in control.

Treas. Reg. 45, Art. 622 (1919).

The United States implies that receivers, trustees in bankruptcy, and assignees are "deemed" to stand in the place of corporate management, U.S. Br. 16, but that puts it backwards: this Court recognized, in a case not cited by petitioners, that receivers, trustees in bankruptcy, and

abundantly clear, only to persons who are in charge of the corporation's affairs.

[23] *See* § 239(a) of the Revenue Acts of 1921, ch. 136, 42 Stat. 227, 259; 1924, ch. 234, 43 Stat. 253, 287; 1926, ch. 27, 44 Stat. 9, 45; § 52(a) of the Revenue Acts of 1928, ch. 852, 45 Stat. 791, 808; 1932, ch. 209, 47 Stat. 169, 188; § 52 of the Revenue Acts of 1934, ch. 277, 48 Stat. 680, 697; 1936, ch. 690, 49 Stat. 1648, 1670; 1938, ch. 289, 52 Stat. 447, 476-77; § 52(a) of the Internal Revenue Code of 1939, ch. 2, 53 Stat. 1, 27-28.

assignees have return-filing obligations *because* (and only when) they, in fact, stand in management's shoes. In *North American Oil Consolidated v. Burnet*, 286 U.S. 417 (1932), the Court, speaking through Justice Brandeis, held that Section 13(c) of the Revenue Act of 1916 did not apply to a receiver who held oil property pending litigation concerning title. The Court explained as follows:

> The language of the section contemplates a *substitution* of the receiver for the corporation; and there can be such substitution only when the receiver is in *complete control* of the properties and business of the corporation.

286 U.S. at 423 (emphasis added).

The reason for requiring "complete control" is, of course, that the purpose of Section 6012(b)(3) is not to obtain information about particular items of income but to provide for the filing of a complete corporate income tax return for a particular period, reflecting all items of income and deduction (including carryforwards and carrybacks from other periods) of the corporation itself and of any consolidated subsidiaries, and what the filer needs is "hands-on" control of corporate records and corporate affairs. This is precisely the Court's explanation of the "complete control" requirement in *North American Oil*:

> [T]here is no provision for the consolidation of the return of a receiver of part of a corporation's property or business with the return of the corporation itself. It may not be assumed that Congress intended to require the filing of two separate returns for the same year, each covering only a part of the corporate income, without making provision for consolidation so that the tax could be based upon the income as a whole.

Id. The three statutory terms—"trustee in a case under title 11," "receiver" and "assignee"—have always referred only to persons who, unlike the Liquidating Trustee here, have *displaced* corporate management and have the "complete control" of the properties and business of a corporation needed to file accurate returns.

Trustees. "Trustee in a case under title 11" is a term of art in both the Bankruptcy Code and the Internal Revenue Code. It refers to a person appointed, under one of several specific provisions of the Bankruptcy Code, prior to confirmation of a plan or discharge, to stand in the shoes of the debtor. Section 321 prescribes eligibility requirements for service, and Section 322(a) prescribes how "a person selected under section 701, 702, 703, 1104, 1163, 1302, or 1202 of this title to serve as trustee in a case under this title" qualifies to serve. It is clear in context that "trustee in a case under this title," as used in Section 322(a), means a person appointed under one of the listed sections to serve as trustee under one of the four chapters, 7, 11, 12 or 13.

Section 323(a) of the Bankruptcy Code says, "the trustee in a case under this title is the representative of the estate." That core description of the function of a "trustee in a case under this title" has no sensible application to the Liquidating Trustee, who was appointed pursuant to the confirmed plan after there had ceased to be any "estate." *See supra* pp. 19-20. The description precisely fits any trustee appointed pursuant to the provisions of any of the four chapters, all of which contemplate that any appointment will be made prior to confirmation of a plan (or discharge) and that the trustee will truly assume the management of the estate. In particular, Section 1104, the section applicable to cases in chapter 11, provides for the appointment of a trustee "[a]t any time after the commencement of the case but before confirmation of a plan."

A true "trustee in a case under title 11" of course displaces corporate management and has the "complete control" described in *North American Oil.* In *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985), this Court described at length the broad powers of a trustee appointed pursuant to the Bankruptcy Code and concluded: "Congress contemplated that when a trustee is appointed, he assumes control of the business,

and the debtor's directors are 'completely ousted.' See H.R. Rep. 95-595, pp. 220-221 (1977)." *Id.* at 352-53 (footnote omitted).

It is also clear that the term "trustee in a case under title 11" was used in Section 6012(b)(3) of the Internal Revenue Code with the same meaning as it has in the Bankruptcy Code, *i.e.*, to refer to a person who, under Section 323(a) of the Bankruptcy Code, "is the representative of the estate." Indeed, prior to 1980, the term in Section 6012(b)(3) was "trustee in bankruptcy" (the term that is still used in the current Treasury regulations, Treas. Reg. § 1.6012-3(b)(4)). The modification made by the Bankruptcy Tax Act of 1980 [24] was merely a technical amendment to conform to the terminology of the new Bankruptcy Code. *See* S. Rep. No. 1035, 96th Cong., 2d Sess. 47-48 (1980).

Receivers. The United States conceded at the petition stage that it did "not intend to suggest that the liquidating trustee was appointed as a 'receiver' " noting that 11 U.S.C. § 105(b) bars a bankruptcy court from appointing a receiver in "a case under this title." U.S. Pet. 16 n.12. The term "receiver" is used in the law with a variety of meanings, but in the few cases under Section 6012(b)(3) and predecessors it has never, to our knowledge, been applied to a person who did not displace corporate management. For example, in *Pinkerton v. United States*, 170 F.2d 846 (7th Cir. 1948), a court-appointed receiver who "succeeded to and continued [the corporation's] sole business function" did not contest his status as a receiver. *Id.* at 847. In *Kavanagh v. First National Bank*, 139 F.2d 309 (6th Cir. 1943), a predecessor of Section 6012(b)(3) was applied to a receiver after the Comptroller of the Currency had placed a bank in receivership after closing the bank.[25] No case we have found

[24] Pub. L. No. 96-589, § 6(i)(5), 94 Stat. 3389, 3410 (1980).

[25] Most of petitioners' "receiver" cases did not involve Section 6012(b)(3) or its predecessors but applied the term in entirely different contexts. *See Spring Valley Water Co. v. City & County of San Francisco*, 246 U.S. 391 (1918); *Financial & Indus. Sec. Corp.*

suggests that the term "receiver" includes a person (like the Liquidating Trustee) who administers a fund for the payment of claims while regular corporate management continues to manage the corporation's business, which the fund administrator is prohibited from changing.

Assignees. In the context of Section 6012(b)(3) and predecessors, this term has always been read to apply to a person who, *like* a "trustee in a case under title 11" but outside the bankruptcy context, "stands in the place" of corporate management. Of all the cases cited by petitioners in which Section 6012(b)(3) or a predecessor statute was actually applied, many involved true trustees in bankruptcy, acting prior to confirmation or discharge as "the representative of the estate."[26] Most of the re-

v. Commissioner, 27 B.T.A. 989 (1933) (Board of Tax Appeals without jurisdiction over case of dissolved corporation in hands of liquidating [illegible], *Banco di Napoli Agency v. Commissioner*, 1 T.C. 8 (194[illegible] Court without jurisdiction over case of bank in hands of state superintendent of banks); *Want v. Alfred M. Best Co.*, 105 S.E. 2d 678 (S.C. 1958) (estate of insolvent decedent subject to summary assessment of tax); *Jacoby v. Bond & Mortgage Guar. Co.*, 72 F.2d 420 (2d Cir.) (court without power to interfere with state superintendent's management of corporation), *cert. denied*, 293 U.S. 619 (1934); *Tolfree v. New York Title & Mortgage Co.*, 72 F.2d 702 (2d Cir.) (same), *cert. denied*, 293 U.S. 619 (1934).

United States v. MacDonald & Eide, Inc., 670 F. Supp. 1226 (D. Del. 1987), *aff'd*, 865 F.2d 73 (3d Cir. 1989), and *State ex rel. Gibson v. American Bonding & Casualty Co.*, 281 N.W. 172 (Iowa 1938) (both cited, U.S. Br. 28 n.21) both concerned receivers for dissolved corporations, where there was no ongoing management, and in *MacDonald & Eide* the receiver was held *not* obliged to file corporate returns. *Scott v. Western Pac. R.R. Co.*, 246 F. 545 (9th Cir. 1917) (cited, Debtors Br. 26 n.28) says nothing pertinent to the application of Section 6012(b)(3).

[26] *See Nicholas v. United States*, 384 U.S. 678 (1966) (trustee in bankruptcy under Bankruptcy Act); *In re Sapphire S.S. Lines, Inc.*, 762 F.2d 13 (2d Cir. 1985) (same); *In re I.J. Knight Realty Corp.*, 501 F.2d 62 (3d Cir. 1974) (same); *United States v. Sampsell*, 266 F.2d 631 (9th Cir. 1959) (same); *Security-First Nat'l Bank v. United States*, 153 F.2d 563 (9th Cir. 1946) (same); *In re Loehr*, 98 F. Supp. 402 (E.D. Wis. 1950) (same); *United States*

mainder, involving persons other than true trustees in bankruptcy, involved persons acting after the formal dissolution of a corporation, when no other person remained in a position to conduct the corporation's affairs.[27] No case

v. Metcalf, 131 F.2d 677 (9th Cir. 1942), *cert. denied*, 318 U.S. 769 (1943) (same); *In re Knight's Mill, Inc.*, 24 Bankr. 143 (Bankr. E.D. Mich. 1982) (chapter 7 trustee). In *Nicholas* and *Sapphire*, the obligation to file returns was not at issue.

[27] *See United States v. Loo*, 248 F.2d 765 (9th Cir. 1957), *cert. denied*, 356 U.S. 928 (1958); *Tazewell Elec. Light & Power Co. v. Strother*, 84 F.2d 327 (4th Cir. 1936); *First Nat'l Bank v. United States*, 86 F.2d 938 (10th Cir. 1936); *Whitney Realty Co. v. Commissioner*, 80 F.2d 429 (6th Cir. 1935), *cert. denied*, 298 U.S. 668 (1936); *Hellebush v. Commissioner*, 65 F.2d 902 (6th Cir. 1933); *Northwest Utils. Sec. Corp. v. Helvering*, 67 F.2d 619 (8th Cir. 1933), *cert. denied*, 291 U.S. 684 (1934); *Taylor Oil & Gas Co. v. Commissioner*, 47 F.2d 108 (5th Cir.), *cert. denied*, 283 U.S. 862 (1931); *Hersloff v. United States*, 310 F.2d 947 (Ct. Cl.), *cert. denied*, 373 U.S. 923 (1963); *Smith v. Commissioner*, 26 B.T.A. 1178 (1932); *O'Sullivan Rubber Co. v. Commissioner*, 120 F.2d 845 (2d Cir. 1941).

An exception that proves the rule is *Louisville Property Co. v. Commissioner*, 140 F.2d 547, 548 (6th Cir.), *cert. denied*, 322 U.S. 755 (1944), in which the corporation had not been formally dissolved, but had been placed in receivership by court order and had then assigned its property to a trust company for the benefit of creditors and stockholders. The court noted, "[t]he corporation was not dissolved, but was kept alive solely, it is said, for the purpose of providing a register of stockholders in the event that their equity should prove of value." Conversely, in *Commissioner v. Merchants National Building Corp.*, 131 F.2d 740 (5th Cir. 1942), where a corporation transferred its securities business to a trust for liquidation but was not formally dissolved, the court ruled that the trustee was not required to file a return on behalf of the corporation, distinguishing *First National Bank*, *Taylor Oil & Gas Co.*, *Northwest Utils. Sec. Corp.*, and *Hellebush* on the ground that "[t]he cases relied upon by the Commissioner were all concerned with situations where transfers of corporate assets were made as part of, or in connection with, a plan for dissolution" (131 F.2d at 740), whereas "in the case at bar the contention of the Commissioner is confronted with the unequivocal finding of the Board of Tax Appeals that dissolution of the Securities Corporation was not contemplated in May 1934 [when assets passed to the trust]." *Id.* at 741.

cited by petitioners involved anything like a person whose function was to pay claims while the management of a reorganized corporate debtor remained in place and bore the responsibility for the corporation's ongoing affairs.[28]

2. *The Liquidating Trustee did not "stand in the place" of management of the reorganized corporate debtors.*

The bankruptcy court found after trial that the "plan created the trust solely to pay the debtors' indebtedness in a manner specified by the plan," Pet. App. 32a, and two courts accepted this finding on appeal. The record overwhelmingly supports the conclusion that the Liquidating Trustee was not intended to, and did not, function as a surrogate for management of the reorganized corporate debtors. The current affairs of these corporations are not his responsibility.

The information available to the Liquidating Trustee is incomplete because he has been denied post-confirmation

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[28] In *National Metropolitan Bank v. United States*, 345 F.2d 823 (Ct. Cl. 1965), liability under Sections 6012(b)(3) and 6151 was not at issue. The court cited Section 6012(b)(3) in the course of holding that a corporation remained in existence during liquidation and could deduct local taxes paid by an assignee that expressly assumed its liabilities. *J. Ungar, Inc. v. Commissioner*, 244 F.2d 90 (2d Cir. 1957) (cited, U.S. Br. 28 n.21) concerned whether a corporation remained in existence for tax purposes and is wholly irrelevant.

Many of the cases cited by petitioners involved an issue not relevant to this case. Prior to 1954, the statute provided that only a person "operating the property or business" was required to file a return. This requirement, which was eliminated in 1954, spawned a good deal of litigation over whether the statute applied at all in a liquidation context where there was *no active "operation." See In re I.J. Knight Realty Corp.*, 501 F.2d 62 (3d Cir. 1974), and *United States v. Sampsell*, 266 F.2d 631 (9th Cir. 1959). Respondent Smith does not contend that there is any current statutory requirement of an active business or that there was no current active business here. He contends that Section 6012(b)(3) has always referred to a person currently in charge of a corporation's affairs and that, with respect to the reorganized debtors, he plainly is not such a person.

records of the reorganized debtors and all records relating to their nondebtor affiliates, *see supra* p. 7. But like most plans of corporate reorganization, the Plan contemplated the continued existence of the corporate debtors, and the debtors have remained in existence, made various corporate filings, continued to have their own officers (J.A. 161, 164-65), offices and employees (*id.* at 98), done battle over their pre-petition properties, *see supra* n.5, and of course retained whatever property they have accumulated since confirmation.

The Plan contemplated that the corporate debtors would continue to conduct their business without interference from the Liquidating Trustee. It provided that the Liquidating Trustee shall "[t]ake no action that would change the business of any of the Debtors as conducted at or prior to the filing of the Petitions." *Id.* at 43. The Plan assumed the continued existence of Holywell's many nondebtor subsidiaries, whose ownership has been a matter of some contention (see *supra* pp. 7-8) but whose affairs have as a practical matter been controlled by Gould and Holywell. The Plan also explicitly assumed (J.A. 50) that the debtors would retain all of their own records, subject to the Liquidating Trustee's limited right to inspect and copy records "regarding objections to claims against the estate with a view toward the prompt determination of said objections and a prompt consummation of the Plan." *Id.* The Plan said nothing at all about records of the nondebtor subsidiaries, although at least some of the subsidiaries were part of Holywell's consolidated return group for federal income tax purposes. And the Plan also requires that any surplus remaining after the payment of claims be returned to petitioner debtors, including the corporate debtors, "pro rata." *Id.* at 39, 47.

Gould and Holywell's chief financial officer, Edgar Schumacher, certainly have not acted as if the Liquidating Trustee "stood in their place." They have battled actively and successfully to deny the Liquidating Trustee access to current control of corporate records (without

which, as a practical matter, consolidated tax returns for Holywell and its subsidiaries cannot be prepared). *See supra* p. 7. They contended, until well after the bankruptcy court's decision in this case, that Holywell's nondebtor subsidiaries reverted to Holywell upon confirmation of the Plan and were wholly outside the reach of the Liquidating Trustee. And they insisted well into 1987, long after the Liquidating Trustee took office, that they and not he were responsible for filing the federal corporate income tax returns of the reorganized corporate debtors, and in 1988 they in fact did file the consolidated return for the year ending July 31, 1985, demanding that respondent Smith pay the tax shown as due.[29] *See supra* p. 9.

In sum, the pertinent terms of the Plan and the post-confirmation behavior of the reorganized debtors fully support the finding below that the Liquidating Trustee was essentially a "disbursing agent" (Pet. App. 12a) with "limited and ministerial duties" (Pet. App. 11a) and our contention that he did not in any sense "stand in the place" of the managements of the reorganized corporate debtors—the taxpayers whose returns petitioners want the Liquidating Trustee to file. The parts of the Plan that dealt with the Liquidating Trust were essentially backward looking, creating a mechanism to pay these corporations' preconfirmation debts while they went about their post-confirmation affairs. Those affairs are to be reflected in the post-confirmation corporate tax returns whose filing is at issue. With respect to those affairs, as the petitioner debtors themselves vigorously insisted until recently, the Liquidating Trustee not only lacked the "complete control" required by *North American Oil Consolidated*, he had no role at all.[30]

[29] That demand had no basis whatever in the Internal Revenue Code provisions at issue in this case: Section 6151 provides that the person required to file the return shall pay the tax. The debtors' demand is consistent with petitioners' curious notion that anyone who holds assets of, or received from, a taxpayer is obligated to pay his taxes. There is no such "universal transferee liability" principle in the Internal Revenue Code.

3. *Section 6012(b)(5) makes clear that the Liquidating Trustee should not file returns for the reorganized debtors because he does not control the pertinent information.*

Section 6012(b)(5) is instructive here. That section provides that, where Section 6012(b) applies in a situation involving joint fiduciaries (such as co-executors), the return is to be filed by a fiduciary with sufficient knowledge of the taxpayer's affairs:

> (5) *Joint fiduciaries.* Under such regulations as the Secretary may prescribe, a return made by one of two or more joint fiduciaries shall be sufficient compliance with the requirements of this section. A return made pursuant to this paragraph shall contain a statement that the fiduciary has sufficient knowledge of the affairs of the person for whom the return is made to enable him to make the return, and that the return is, to the best of his knowledge and belief, true and correct.

26 U.S.C. § 6012(b)(5). *See also* Treas. Reg. § 1.6012-3(c). The statutory provision and implementing regulation are not applicable to the present case because the Liquidating Trustee is not a "joint fiduciary": he has no fiduciary role at all with respect to the reorganized corporate debtors.

[30] We note as well that there has been no determination in this case that the Liquidating Trustee in fact had possession of or title to all or substantially all of the property or business of either corporate debtor or the nondebtor subsidiaries that must join in the consolidated returns. The date as of which such a determination is to be made is not clear but is presumably either the end of each tax year or the date on which each return is due. As of each such date, there may be issues as to (a) assets acquired by a debtor after confirmation, (b) corporate records, which are an important component of both "property" and "business," (c) the stock and net worth of the nondebtor subsidiaries, and (d) various other assets for which the debtors did battle as described in *supra* n.5.

But it is nevertheless relevant that the Liquidating Trustee could not make the required representation because, as we have shown, he had been denied knowledge of the current affairs of the debtors and their affiliates. Section 6012(b)(5) reflects, in the context of Section 6012(b)(3), the fundamental principle that tax returns are to be filed by persons who can report on the taxpayer's affairs as a whole. The only persons in a position to file for the years at issue and make the required representation were the corporate debtors' management, as demonstrated by the fact that Gould in fact signed and filed the consolidated return of Holywell for the tax year ending July 31, 1985, making the required representation of accuracy under penalties of perjury.

II. THE LIQUIDATING TRUSTEE IS NOT PERSONALLY LIABLE FOR FEDERAL INCOME TAXES OWED BY THE DEBTORS: 31 U.S.C. § 3713 AND 28 U.S.C. § 960 HAVE NO BEARING ON THE QUESTION PRESENTED IN THIS CASE.

Petitioner debtors argue that 31 U.S.C. § 3713 and 28 U.S.C. § 960 render respondent Smith personally liable for payment of the debtors' taxes. These arguments were not made to the bankruptcy court by any of the petitioners, were not discussed by any of the courts below, and are not made to this Court by the United States. They are without merit, and the debtors' attempt to inject this issue to make respondent Smith fear for his personal assets is entirely inappropriate.[31]

[31] Even if, contrary to our argument in Part I, Sections 6012 (b)(4) and (b)(3) are applicable in this case, no party contends that respondent Smith would have any liability under 26 U.S.C. § 6151 beyond the assets remaining in his hands in his official capacity. This Court has resolved any such question: "Nothing in § 6151 of the Internal Revenue Code . . . which obliges the person required to file a return to pay the tax in question, imposes any obligation on the trustee other than in his capacity as the representative of the bankrupt estate." *Nicholas v. United States*, 384 U.S. at 694 n.28.

No one would agree to serve as "trustee in a case under title 11" if, merely by accepting the responsibility to file returns, he or she were exposing personal assets to liability for the bankrupt's taxes that the bankrupt's assets are insufficient to pay. When Congress intends to impose personal liability for the payment of taxes on a person acting in a specified capacity, it does so explicitly. *See* 26 U.S.C. §§ 2032A(c) (qualified heir "personally liable" for additional estate tax in certain circumstances); 3505 (under certain circumstances, lender "liable in his own person and estate" for taxes required to be deducted and withheld from wages); 6324 (a)(2) (specified transferees, including trustees, "personally liable" for unpaid estate tax); and 6332(d) (person failing to honor IRS levy becomes "liable in his own person and estate").

A. 31 U.S.C. § 3713 Has No Application to this Case, Which Is Plainly a "Case Under Title 11."

31 U.S.C. § 3713 has two subsections. Subsection (a) provides that, in certain circumstances, "[a] claim of the United States Government shall be paid first." But even if an inchoate tax liability of a kind assumed arguendo here would qualify as a "claim," Section 3713(a) has no application to this case, because paragraph (2) of this subsection says, without qualification, "This subsection does not apply to a case under title 11." Subsection (b) holds a "representative" liable for paying any part of a person's debt ahead of "a claim of the Government," but this subsection contains a corresponding exception for "a trustee acting under title 11."

This is plainly a "*case* under title 11." The jurisdiction of the district court over the bankruptcy proceeding is based on 28 U.S.C. § 1334(a), conferring jurisdiction over "all cases under title 11." The power of the bankruptcy court to, among other things, confirm the Plan, appoint the Liquidating Trustee, order the transfer of assets to the Liquidating Trustee, and direct payments by the Liquidating Trustee pursuant to the Plan is based on the power of bankruptcy judges under 28 U.S.C. § 157(b)(1) to "hear and determine all cases under title 11." As the Government points out (U.S. Pet. 14 n.10; U.S. Br. 21 n.15), insofar as this is a declaratory judgment proceeding "with respect to Federal taxes," 28 U.S.C. § 2201 would bar the proceeding if it were not

"a proceeding under section 505 or 1146 of title 11." Perhaps most important, it is the proceedings under title 11 that led to the Plan, the ranking of claims set forth therein, and the bankruptcy court's orders to the Liquidating Trustee as to whom to pay.

The petitioner debtors argue (Debtors Br. 31-33) that if respondent Smith is not a "trustee in a case under title 11" for purposes of 26 U.S.C. § 6012(b)(3), then he is not a "trustee acting under title 11" for purposes of 31 U.S.C. § 3713(b) and should be personally liable for not first paying the Government's alleged claim. This is mere sleight of hand. The relevant exception is the exception in subsection (a)(2) of Section 3713 for "a case under title 11." Since this is plainly such a *case*, there is no Section 3713(a) government priority; Section 3713(b) therefore has no application, and whether respondent Smith is a *trustee* within the meaning of Section 3713(b) is irrelevant.

Petitioner debtors' lengthy historical exegesis (Debtors Br. 31-34) does not affect the clear inapplicability of Section 3713 to this case. Sections 3713(a) and (b) are the successors to two sections, Revised Statutes of the United States of 1878 (R.S.) §§ 3466 and 3467, which were codified at 31 U.S.C. §§ 191 and 192 (1976).[32] Until 1978, these sections contained no exception for bankruptcy proceedings.[33] There were, however, troubling questions about the relationship of these sections to the priorities specified in Section 64 of the Bankruptcy Act. *See Nicholas v. United States*, 384 U.S. at 694 n.28. In 1978, as part of the Bankruptcy Reform Act, Congress eliminated these questions, specifying that 31 U.S.C. § 191 (R.S. § 3466) did not apply to "a case under title 11 of the United States Code." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 322, 92 Stat. 2549, 2678 (1978). Congress simultaneously made a "conforming amendment" to 31 U.S.C. § 192 (R.S. 3467), intended to negate personal liability "for non-payment of Government claims in bankruptcy cases, where the Government is not entitled to priority [under Section 191]." H.R. Rep. No. 595, 95th Cong., 1st Sess. 455 (1977); *see also* S. Rep. No. 989, 95th Cong., 2d Sess. 163-64 (1978). Finally, in 1982, Congress recodified title 31, and Sections 191 and 192 emerged as the two subsections of Section 3713. *See* Money and Finance, enactment as title 31, United States Code, Pub. L. No. 97-258, § 3713, 96 Stat. 877, 972 (1982). No substantive change was intended by this recodification. H.R. Rep. No. 651, 97th Cong., 2d Sess. 3 (1982).

[32] Even before they were combined in a single section, the two provisions were read together. "Section 191, which establishes government priorities on any debts owed by an insolvent debtor to the United States, and § 192, which gives assurance that such debts will be paid, are part of a single statutory structure." *King v. United States*, 379 U.S. 329, 334, 336 (1964) (footnote omitted).

[33] This accounts for the application of Section 192 in *King v. United States*, which petitioner debtors misleadingly invoke (Debtors Br. 13, 23-24) in support of applying Section 3713 here. In fact, in *King*, since there was then no general bankruptcy-case exception, the petitioners "conceded the Government's priority claim under § 191." 379 U.S. at 336.

Congress's explicit intent, in 1978, was to eliminate, for bankruptcy cases, all statutory priorities outside of title 11. In addition to Section 322 amending 31 U.S.C. §§ 191 and 192, title III of the Bankruptcy Reform Act contained 35 other sections amending provisions of federal law. The House Report said, "the bill, in the interest of a coherent bankruptcy policy, eliminates special priorities found in other laws and brings all priorities into the bankruptcy code itself." H.R. Rep. No. 595, 95th Cong., 1st Sess. 285 (1977); *accord* S. Rep. No. 989, 95th Cong., 2d Sess. 3 (1978). *See also* H.R. Rep. No. 595, 95th Cong., 1st Sess. 193 (1977) ("The more major priority set aside [by the Act] is the . . . Federal priority established in [Section 191]. The chorus calling for repeal of that priority in bankruptcy cases has grown in recent years.").

Despite all this, petitioner debtors argue, without meaningful citation, that the exception in § 3713 for "a

case under title 11" should be construed to apply only to those "claim[s] of the United States Government" that accrue prior to confirmation and are entitled to administrative priority. Debtors Br. 31-32. This imaginative statutory revisionism would involve major surgery on a term used consistently in titles 26, 28, and 31. Congress made clear its intention that "case under title 11" be read to include all proceedings under the direction of a bankruptcy court, whether arising before or after the confirmation of a plan. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 445 (1977) ("The jurisdiction granted under [what is now 28 U.S.C. § 1334(a) over 'cases under title 11'] is of the whole bankruptcy case."). One leading commentator summarizes as follows:

> [The] "case" referred to in section 1334(a) is the case upon which all of the proceedings which follow the filing of a petition are predicated. The filing of a petition for relief constitutes commencement of the title 11 case. From that beginning follow all of the proceedings, whether called controversies, contested matters, suits, actions or disputes, that will occur in the unfolding of the case under the Bankruptcy Code. The title 11 case ends only when it is closed under section 350(a) of title 11.

1 *Collier on Bankruptcy* ¶ 3.01(1)(c)(i), at 3-20 (15th ed. 1991). *See also In re Fortner Oilfield Servs., Inc.*, 49 Bankr. 9, 10 (Bankr. N.D. Tex. 1984) ("Jurisdiction of the Bankruptcy Court attaches upon the filing of a petition for an order for relief and continues in a Chapter 11 proceeding until the case is closed."); *In re Weathersfield Farms, Inc.*, 34 Bankr. 435, 438 (Bankr. D. Vt. 1983); *In re J.M. Fields, Inc.*, 26 Bankr. 852 (Bankr. S.D.N.Y. 1983). None of the five bankruptcy cases in which this matter arises has been closed pursuant to 11 U.S.C. § 350(a).

Finally, there is no basis for petitioner debtors' assumption that a federal claim must be entitled to either administrative priority under the Bankruptcy Code or Section 3713 priority. Congress did not say, in Section

3713, that the section should not apply to claims having administrative priority. It said that the section should not apply to "a case under title 11."

B. 28 U.S.C. § 960 Has No Bearing on this Matter.

Contrary to the suggestion of petitioner debtors (Debtors Br. 33 n.38), 28 U.S.C. § 960 does not of its own force impose any obligation to pay federal (or state) income tax. It merely makes clear that a business being operated by an officer or agent under the authority of a United States court is subject to otherwise applicable taxes. Since respondent Smith makes no claim of immunity from any otherwise applicable tax—he claims only that he was not obliged to file the debtors' returns and that he is not personally liable for any tax due—Section 960 has no bearing here.

Congress enacted the precursor to Section 960 [34] in response to a district court decision [35] holding that a business operated by a federal receiver was immune from liability for certain state taxes. The objective was to overturn that decision and level the playing field for competitors of businesses operated by federal receivers. The House Report explained as follows:

> As a consequence of [the *Howe*] decision, your committee is advised, the State of Missouri and other states having similar statutes are losing thousands of dollars of revenue per month. No good reason is perceived why a receiver should be permitted to operate under such an advantage as against his competitors not in receivership, and the States and local governments be deprived of this revenue.

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[34] *See* Act of June 18, 1934, ch. 585, 48 Stat. 993 (1934), later codified at 28 U.S.C. § 124a (1940). Section 960 was given its present form in the Act of June 25, 1948, ch. 646, 62 Stat. 927 (1948). *See* H.R. Rep. No. 2646, 79th Cong., 2d Sess. A100 (1946).

[35] *Howe v. Atlantic, Pac. & Gulf Oil Co.*, 4 F. Supp. 162 (W.D. Mo. 1933), *rev'd, Kansas City v. Johnson*, 70 F.2d 360 (8th Cir.), *cert. denied*, 293 U.S. 617 (1934).

H.R. Rep. No. 1138, 73d Cong., 2d Sess. 1 (1934); *see also* S. Rep. No. 1372, 73d Cong., 2d Sess. 1 (1934); 78 Cong. Rec. 6656 (1934).

Section 960 does not impose federal tax obligations outside the comprehensive provisions of the Internal Revenue Code. Its purpose, as construed by this Court, was to eliminate immunity for judicial officers. *See Palmer v. Webster & Atlas Nat'l Bank*, 312 U.S. 156, 166 (1941) (the "obvious purpose" of the precursor to section 960 "was to negative the idea that a federal receiver or trustee could ignore the rules of law of the state of operation affecting the conduct of the business committed to his charge"); *see also In re I. J. Knight Realty Corp.*, 501 F.2d at 66; *United States v. Sampsell*, 266 F.2d at 635.

Contrary to the debtors' assertions (Debtors Br. 18-19), nothing in this Court's decision in *California State Board of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989), stands for the proposition that Section 960 itself imposes any affirmative tax obligations. The contention in *Sierra Summit* was that a liquidating trustee was *immune* from state tax: the argument was that Section 960 eliminates immunity only as to persons "conducting any business" and therefore, by implication, this is "the sole area where the state is permitted to impose a tax of any type." *Id.* at 851 (citations omitted). The Court rejected that argument, stating that "Section 960 is not such a clear expression of an *exemption* from state taxation" (*id.* at 852 (emphasis added)), and that there is otherwise no such immunity unless Congress clearly expresses itself to that effect. The Court did not hold that Section 960 itself reaches liquidation activities that fall short of "conducting a business," *see Nicholas v. United States*, 384 U.S. at 694 n.28 (Section 960 inapplicable where trustee's activities "do not amount to the conduct of business in any meaningful sense"), or that the section ever does anything more than eliminate immunity.

Finally, the brief amici curiae filed by a number of state attorneys general misconstrues the issue before the Court. That issue is limited, in the question presented by the petitioners and by the decision below, to respondent Smith's filing and payment obligations under federal law: the Eleventh Circuit held only that Sections 6013(b)(3) and (b)(4) of the Internal Revenue Code do not apply to the Liquidating Trustee. He does not claim any intergovernmental immunity from state law obligations, and whether he has state-law filing or payment obligations is not the present issue.

C. Respondent Smith Is Not Responsible for Any Difficulty the United States May Encounter in Collecting Any Tax Owed by the Debtors

Contrary to the petitioner debtors' repeated implications, there is no basis whatever for blaming respondent Smith for any shortfall between the debtors' tax liabilities and the amount the United States can now collect. References to "infidelity to the United States" (Debtors Br. 34) are entirely out of place. Smith was a stranger to the debtors' affairs until the confirmed plan became effective on October 10, 1985. The record before this Court does not suggest that his discharge of his responsibilities since that date is subject to any relevant criticism.

To begin with, the Trustee of course bears no responsibility for the terms of the Plan. He played no role in its formulation or adoption. By contrast, the United States, a party to the bankruptcy proceedings, never objected to the Plan in any respect and did not appeal its confirmation. And petitioner debtors did not press any objection on tax grounds in the bankruptcy court and declined the bankruptcy court's explicit request for help on tax issues. *See supra* pp. 3-4.

The Trustee's lack of responsibility for the terms of the Plan is important, because any shortfall in funds to pay taxes may be traceable to the very structure of the Plan. On October 10, 1985, the Liquidating Trustee received

Miami Center, which the Plan directed him to sell to the Bank for $255,600,000, of which approximately $242,000,000 took the form of cancellation of indebtedness and only $13,600,000 minus various adjustments was received in cash. Thus, the Plan itself directed the Liquidating Trustee to sell the debtors' principal asset at a stated price of which only a small fraction was paid in cash. It could hardly be clearer that any resulting shortfall in cash available to pay taxes is not of the Liquidating Trustee's making.

The Plan also instructed the Liquidating Trustee explicitly with respect to the payment of claims. Since taking office, the Liquidating Trustee has made no payment in respect of a claim that was not directed by the Plan itself or by an order of the bankruptcy court. A cash shortfall resulting from these payments is also not the personal responsibility of the Trustee.

Finally, the debtors took the position until 1987 that the filing of tax returns was their responsibility, that returns would be prepared by their accounting firm, and that the activities of the Liquidating Trustee and his accounting firm, Arthur Andersen & Co., should be limited to supplying information. *See supra* pp. 8-9. Any adverse consequence of the failure to file returns during the period when the debtors were claiming this as their responsibility is, again, obviously not the fault of the Liquidating Trustee. When the debtors changed their position, the Liquidating Trustee filed the adversary complaint in the present case, in which three lower courts agreed that he was not responsible for filing the returns at issue. The suggestion that he may be personally responsible for the present situation is wholly without merit.[36]

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[36] *Cf. Mosser v. Darrow*, 341 U.S. 267 (1951) (reorganization trustee personally liable only for willful and intentional violations of fiduciary duty); *see also Yadkin Valley Bank & Trust Co. v. McGee*, 819 F.2d 74 (4th Cir. 1987); *In re Chicago Pac. Corp.*, 773 F.2d 909, 915 (7th Cir. 1985); *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451 (6th Cir. 1982).

III. THE DECISION OF THE COURT OF APPEALS IN THIS CASE DOES NOT CREATE A TAX LOOPHOLE.

Petitioners' assertion that the inapplicability of Sections 6012(b)(4) and (b)(3) to the Liquidating Trustee creates a troubling tax loophole is incorrect. First, this case does not involve any reduction in the tax liability of any taxpayer. Second, the decision below did not deprive the United States of the ability to collect any tax due. Any collection problem the government now faces (and the record does not demonstrate any such problem) is of its own making in this case and can be avoided in future cases if the Internal Revenue Service (1) objects on a timely basis to a plan of reorganization that it believes does not make appropriate provision for payment of post-confirmation federal taxes, *or* (2) exercises powers that Congress granted in 1986 for the explicit purpose of dealing with situations like the present one.

There is no dispute in this case as to who the taxpayers are or what their tax liability is. The taxpayers are Gould, his estate (which concededly terminated before the appointment of the Liquidating Trustee), Holywell, MCC, and the nondebtor subsidiaries of Holywell that are members of its consolidated group. All agree that it is the tax returns of these taxpayers that are at issue, and the income to be shown on the returns is their income, and any tax liability is their tax liability. And the amount of tax liability required to be shown thereon, while unknown, is not at issue in this case and was not affected by the court of appeals' decision. The term "loophole"—in its usual sense of an inappropriate reduction in tax liability—has no application in this case.

What the United States is actually arguing is that the implementation of the Plan has given rise to a collection problem. In the first place, that has not been shown to be true. As we have noted (*supra*, p. 10 n.10), there is no basis in the record for estimating the amount of tax due in this complex situation. Nor has there been any show-

ing that the debtors and the nondebtor subsidiaries of Holywell (which are severally liable for consolidated return tax liabilities) will be unable to pay any income tax due.[37]

If there is a collection problem, it is not traceable to the inapplicability of Section 6012(b) but to the Government's failure to object to a plan that provided for (a) the sale of the debtors' principal asset, Miami Center, to their largest creditor, the Bank, for consideration consisting primarily of cancellation of debt (generating a large "amount realized" for tax purposes but little cash) and (b) the prompt payment of much of the available cash to creditors, without reserving monies for the payment of post-confirmation taxes. The Plan could have provided for those steps to be carried out without appointing a Liquidating Trustee or any other person even conceivably reached by section 6012(b).

The Plan was filed in a court proceeding to which the United States was a party, giving the United States an opportunity to object.[38] The United States failed to object,

[37] The debtors *should* bear whatever tax burden there may be. Gain realized on the transfer of their assets, and other income realized in connection with arrangements to pay their debts, are their income. The debtors' notion that any tax due ought to be paid by the Liquidating Trustee, reducing (prospectively or retroactively) the recovery by creditors while preserving the debtors' assets, is entirely wrong.

[38] A claim that a reorganized debtor will be left with insufficient funds to pay its post-confirmation taxes is, of course, a valid basis for objection to a plan as not feasible. *See* 11 U.S.C. § 1129(a)(11). The United States may also object to a plan under Section 1129(d) of the Bankruptcy Code, 11 U.S.C. § 1129(d), if its principal purpose is the avoidance of taxes. Indeed, Section 1129(d) places an affirmative burden on "a party in interest that is a governmental unit" to make such an objection.

Here, the United States might also have objected to the Bank's disclosure statement, on which the other creditors and the court were obviously relying, on the ground that it failed to disclose important tax consequences of the Plan. Section 1125(b) of the Bankruptcy Code, 11 U.S.C. § 1125(b), requires a disclosure state-

allowing the Plan to be voted on and approved by other creditors and confirmed by the bankruptcy court, after which the United States failed to appeal, allowing the plan to be substantially consummated, as a result of which the United States received and accepted payment of its own allowed claims. If the United States wanted to contend, as it now implicitly does, that the Plan's first step—the sale of Miami Center to the Bank in a transaction that might generate far more tax liability than cash —should not be consummated and distributions expressly required by the Plan should not be made without first providing for post-confirmation tax liability, it should have made that contention long ago.

Section 1141(a) of the Bankruptcy Code provides that a confirmed plan is binding on "any entity acquiring property under the plan, and any creditor." The United States was both a creditor in respect of its pre-petition tax claims and a recipient of property under the Plan in respect thereof, and it is well established that Section 1141(a) applies to tax claims. *E.g.*, *In re St. Louis Freight Lines*, 45 Bankr. 546, 551-52 (Bankr. E.D. Mich. 1984) ("a party in interest—in this case the IRS—is bound by the terms of the plan when confirmed, even if the plan ultimately provides it with less than that to which it is otherwise legally entitled"). *Virgin Islands Bureau of Internal Revenue v. St. Croix Hotel Corp.*, 60 Bankr. 412, 414 (D.V.I. 1986), *aff'd sub nom. St. Croix Hotel Corp. v. Government of the Virgin Islands*, 867 F.2d 169 (3d Cir. 1989).

ment to contain "adequate information," defined in Section 1125(a)(1) to mean "information of a kind, and in sufficient detail . . . [to] enable a hypothetical reasonable investor . . . to make an informed judgment about the plan." It is obvious, and well established, that such information includes material "tax consequences which may arise as a result of the debtors' reorganization." *Hall v. Vance*, 887 F.2d 1041, 1043 (10th Cir. 1989); *see also In re Cardinal Congregate I*, 121 Bankr. 760, 765 (Bankr. S.D. Ohio 1990); *In re Jeppson*, 66 Bankr. 269, 292 (Bankr. D. Utah 1986); *In re Malek*, 35 Bankr. 443, 444 (Bankr. E.D. Mich. 1983).

Moreover, the United States, like any other party, risks its interests by failing to assert its rights in bankruptcy proceedings. For example, in *In re International Horizons, Inc.*, 751 F.2d 1213, 1218-19 (11th Cir. 1985), the court of appeals barred the United States from amending its tax claim after the bar date, saying:

> The government had multiple opportunities to assert its claim timely; it did not. It had an opportunity to object to the disclosure statement which did not schedule corporate income taxes; it did not. It was aware that the reorganization plan described payment only of *actual* tax liabilities and that the plan would not be viable should the government reach and prevail on the merits of its tax claim. Yet it did not object to the plan either in writing or at the confirmation hearing. The bankruptcy court held that given the above behavior, the Service was estopped from asserting that a windfall would befall creditors absent the tax claims. We can find no abuse of discretion in the court's equitable consideration of the Service's reorganization posture.

(Emphasis in original.) Here, the bankruptcy court has already rejected an effort to modify the confirmed Plan to provide for additional tax payments:

> The relief sought by the debtors and the government would require the complete dismantling of the substantially consummated plan, more than two and one-half years after its confirmation. A modification would require the liquidating trustee to recover millions of dollars already paid to creditors for redistribution on a pro rata basis. Additionally, the creditors voted on the plan and received payments under the terms of the plan based upon good faith reliance induced, in part, by the inaction of the government. It is simply impracticable, and may well nigh be impossible, to unwind the substantially consummated and confirmed plan.

Pet. App. 36a-37a.

Whatever rights of collection the United States may now have, it does not have the right to remedy its own lack of diligence by distorting Sections 6012(b)(4) and (b)(3). Those sections do not require any person to file tax returns for another individual under any circumstances or for a corporation that has its own vigorous management actively directing its current affairs. And those sections certainly do not make every holder of individual or corporate assets a withholding agent. As between the United States and the Liquidating Trustee here, the Trustee was fully entitled to carry out the Plan pursuant to which he was appointed and to follow the orders of the bankruptcy court.

Finally, the United States has a resource it has wholly failed to employ for dealing with future situations like this case. For funds established after August 16, 1986, 26 U.S.C. § 468B(g) provides:

> Nothing in any provision of law shall be construed as providing that an escrow account, settlement fund, or similar fund is not subject to current tax. The Secretary shall prescribe regulations providing for the taxation of any such account or fund whether as a grantor trust or otherwise.[39]

Under this provision, the Treasury Department has broad authority (which it has not yet exercised[40]) to

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[39] The present provision was enacted by the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 1018(f)(5), 102 Stat. 3342, 3582. It codified, with changes, Section 1807(a)(7)(D)(i) of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, 2816.

[40] In 1990, in connection with another proposed regulation, the IRS invited public comment as to the manner and extent to which it should exercise its authority to prescribe rules under Section 468B(g). 1990-2 C.B. 805, 807.

Even if the Treasury Department had adopted regulations under Section 468B(g), they would not apply to this case because of the statutory effective date. The Liquidating Trust was established on October 10, 1985, and Section 468B(g) applies only to accounts or funds established after August 16, 1986. Pub. L. No. 100-647,

establish by regulation an appropriate regime for taxing funds, like the Liquidating Trust, that are established in a bankruptcy proceeding or otherwise for the payment of claims.[41]

§ 1019(a), 102 Stat. 3342, 3593; Pub. L. No. 99-514, § 1807(a)(7)(D)(ii), 100 Stat. 2085, 2816. This case, therefore, is at worst a relic of the pre-1986 period when there was substantial uncertainty about the tax treatment of settlement funds similar to the Liquidating Trust—an uncertainty to which Section 486B(g) was designed to respond.

[41] Regulations might, for example, provide (in contrast to the concession of all petitioners in this case) that such a fund is a separate taxable entity subject to current taxation. Such regulations might follow the model of Section 468B(b), which provides a special statutory rule for so-called "designated settlement funds" which are taxed at trust rates but for other tax purposes are treated as corporations. 26 U.S.C. § 468B(b)(5). A designated settlement fund is a fund that, *inter alia*, is established for the principal purpose of resolving and satisfying claims arising out of personal injury, death or property damage. § 468B(d)(2)(D). The tax imposed on designated settlement funds is in lieu of any other federal income taxation of income from assets in the designated settlement fund. § 468B(b)(4).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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September 1991

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA CHARLOTTESVILLE DIVISION

Civil Action No. [87-0037]

TWIN DEVELOPMENT CORPORATION,
Plaintiff

v.

FRED STANTON SMITH, BANK OF NEW YORK, and IRVING WOLFF,
Defendants

COMPLAINT AND APPLICATION FOR PRELIMINARY AND PERMANENT INJUNCTION

1. This is a civil action seeking declaratory, injunctive, and equitable relief, and damages. Plaintiff is a Virginia stock corporation with its principal place of business in Albemarle County, Virginia. Defendant Bank of New York is a corporation incorporated under the laws of the State of New York, with its principal place of business in the City of New York, and also doing business in Miami, Florida. Defendant Fred Stanton Smith is an individual citizen and resident of Miami, Florida. Defendant Irving Wolff is an individual citizen and resident of Miami, Florida. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00. Jurisdiction is based on 28 U.S.C. 1332.

2. Holywell Corporation, the sole record shareholder of Twin Development Corporation, also has its sole place of business in Albermarle County, Virginia.

3. On June 23, 1983, in accordance with the provisions of an assignment and security agreement, Holywell Corporation pledged to Bank of New York, as collateral for a loan by the Bank of New York to Chopin Associates and Miami Center Limited Partnership, all the shares of stock of Twin Development Corporation, as well as the shares of stock of other subsidiary corporations owned by Holywell Corporation (the "other subsidiaries"). By the terms of the agreement, Bank of New York's lien on the shares of stock of Twin Development Corporation and the other subsidiaries was to be extinguished upon the repayment of the loan.

4. Holywell Corporation subsequently transferred physical possession of the certificates representing all of the shares of stock of Twin Development Corporation and the other subsidiaries to Bank of New York.

5. On August 22, 1984, Holywell Corporation, Chopin Associates, Miami Center Limited Partership, Miami Center Corporation and Theodore B. Gould filed related Chapter 11 petitions for reorganization with the United States Bankruptcy Court for the Southern District of Florida.

6. On August 8, 1985, the said Bankruptcy Court confirmed a Plan of Reorganization for the filed Debtors which provided for the appointment of a liquidating trustee (not a Bankruptcy Trustee, as defined in the United States Bankruptcy Code) to convey certain improved real property in Miami, Florida, to the Bank of New York, or its nominee, for a price of $255,600,000.00; said conveyance would result in satisfaction of the Debtors' indebtedness to the Bank of New York and the extinguishing of the above-mentioned liens on the stock of Twin Development Corporation and the other subsidiaries, all of which were non-filed, solvent corporations.

7. The said Bankruptcy Court appointed Fred Stanton Smith as the liquidating trustee and appointed Irving

Wolff, Esquire, as the attorney for the liquidating trustee.

8. On October 10, 1985, Fred Stanton Smith, the liquidating trustee and one of the Defendants herein, conveyed the above-mentioned real property to the nominee of the Bank of New York, resulting in satisfaction of the Debtors' indebtedness to the Bank of New York.

9. Upon the transfer of the above-mentioned Miami real property to the nominee of the Bank of New York, the Bank of New York delivered to the said Irving Wolff, then attorney for the liquidating trustee, the certificates representing all of the shares of stock of Twin Development Corporation and the other subsidiaries, inasmuch as the conveyance of the Miami real property had released the Bank of New York's lien on the said shares of stock.

10. On May 15, 1987, the aforementioned Bankruptcy Court dismissed Irving Wolff as attorney for the liquidating trustee, and appointed Herbert Stettin, Esquire, as the new attorney for the liquidating trustee Fred Stanton Smith.

11. Defendant Fred Stanton Smith now asserts, through his new attorney Herbert Stettin, that the shares of stock of Twin Development Corporation and the other non-filed subsidiaries, and, through these shares, all of the assets, real and personal, of Twin Development Corporation and the other subsidiaries—all solvent corporations that were never under the jurisdiction of the Bankruptcy Court and never part of the Debtors' bankrupt estates—are the property of the liquidating trustee, who, not being a Bankruptcy Trustee, is not an officer of the court.

12. Defendant Fred Stanton Smith, through his new attorney Herbert Stettin, threatens to act by voting the shares of stock of Twin Development corporation and the other subsidiaries so as to create new Boards of Directors

which will authorize the liquidation of Twin Development Corporation and the other subsidiaries, and the transfer of the proceeds from such liquidations into the liquidating trust controlled by Defendant Smith.

13. Under the Bankruptcy Code, the ownership of the stock of Twin Development Corporation and the other subsidiaries reverted to Holywell Corporation, outside the jurisdiction of the Bankruptcy Court, upon confirmation of the Plan of Reorganization entered on August 8, 1985.

14. Defendant Bank of New York wrongfully transferred the certificates representing the shares of Twin Development Corporation and the other subsidiaries to Defendant Irving Wolff, who was then attorney for the liquidating trustee, on October 10, 1985.

15. Defendant Fred Stanton Smith now wrongfully asserts that the shares of stock of Twin Development Corporation and the other subsidiaries are the property of the liquidating trustee, and threatens to immediately vote the said shares of stock so as to cause an immediate liquidation of Twin Development Corporation and the other subsidiaries, and the transfer of the proceeds of said liquidations into an account controlled by the liquidating trustee, Defendant Smith.

16. A liquidating trustee not appointed as a Bankruptcy Trustee under 11 U.S.C. 1104, but purporting to exercise the sweeping powers reflected in the allegations herein, is not authorized by the Bankruptcy Code.

17. The actions of the Defendants as set forth above represent part and parcel of a continuous pattern of conduct in which the liquidating trustee, to the extent of the validity of his appointment (which appears to be directly contrary to the provisions of the Bankruptcy Code), has disregarded the legitimate interests of the Plaintiff and the other subsidiaries of Holywell Corporation, said entities being solvent, non-debtor corporations,

and has breached his fiduciary duty to them as beneficiares of the liquidating trust, causing substantial damage to the Plaintiff and the other subsidiaries. The said conduct of the Trustee has included, without limitation:

a. Failure and refusal to establish any reserve for the repayment to plaintiff of a super-priority loan approved by and ordered by the Bankruptcy Court to be paid with priority over all other creditors.

b. Failure and refusal to establish any reserve for the satisfaction of income tax liabilities of Plaintiff and the other non-debtor subsidiaries of Holywell Corporation, incurred as a result of the sale of assets of Plaintiff and the other non-debtor subsidiaries, a significant portion of the proceeds from such sales currently being in the possession of the liquidating trustee.

18. The wrongful actions of Defendant Bank of New York and Defendant Fred Stanton Smith, and the immediately threatened actions of Defendant Smith will, if unchecked, cause immediate irreparable harm to Plaintiff Twin Development Corporation, for which there is no immediately available adequate remedy at law.

WHEREFORE, Plaintiff Twin Development Corporation prays for the following:

1. A hearing on the corporation's application for a preliminary injunction enjoining Defendants Bank of New York, Irving Wolff, and Fred Stanton Smith from taking any action whatsoever with respect to the said shares of stock and/or assets of Twin Development Corporation or the other subsidiaries, and particularly enjoining Defendant Fred Stanton Smith from any efforts to assert his claimed right to vote the shares of stock of Twin Development Corporation or the other subsidiaries in any fashion whatsoever, pending trial of this matter.

2. Judgment requiring Defendant Irving Wolff or any successor holder to deliver to the lawful officers of the Plaintiff all certificates representing the shares of stock in Twin Development Corporation and the other subsidiaries now wrongfully held by him, and a permanent injunction forever enjoining Defendants, or any of them, from asserting any right or claim to the stock or assets of Twin Development Corporation or the other subsidiaries, or, alternatively, a hearing, pursuant to 28 USC 2201 for a determination and declaration of the identity of the proper shareholders of Twin Development Corporation and the other subsidiaries.

3. Inasmuch as this is an action to quiet title to property whose situs is in this district, an order of this court pursuant to 28 USC 1655, directing the out-of-state Defendants named herein, namely, Bank of New York, Irving Wolff, and Fred Stanton Smith, to appear or plead in this matter by a day certain (such order to be served personally on the Defendants).

4. For damages in excess of $10,000.00.

5. And for such other and further relief as justice and equity may require.

Respectfully submitted,

TWIN DEVELOPMENT CORPORATION

By: /s/ Robert M. Musselman
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Robert Musselman and Associates
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P.O. Box 254
Charlottesville, Virginia 22902
(804) 977-4500
Attorneys for Plaintiffs

VERIFICATION

Theodore B. Gould, being first duly sworn, deposes and says:

I am the President of Twin Development Corporation, the Plaintiff herein; I have read the contents of this Complaint, including the request for Preliminary Injunction, Permanent Injunction, and Declaratory Relief, and belief the same to be true according to the best of my knowledge, information, and belief.

/s/ Theodore B. Gould
THEODORE B. GOULD
President
Twin Development Corporation

Sworn to and Subscribed before me this 4th day of August, 1987.

/s/ Faye M. McBurney
Notary Public

My Commission Expires: June 29, 1990

(15) (16)

Nos. 90-1361 and 90-1484

In the Supreme Court of the United States

OCTOBER TERM, 1991

HOLYWELL CORPORATION, ET AL., PETITIONERS

v.

FRED STANTON SMITH, ETC., ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

FRED STANTON SMITH, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. A conspicuous and important analytical error permeates respondents' discussion of this case. Respondents claim that the liquidating trustee should have no liability for taxes on the income he receives because, in what they term the "typical" liquidating bankruptcy, the ultimate distributions made to creditors are not reduced by taxes (Bank Br. 11, 13-15; Smith Br. 17, 40-41). In the so-called "typical" liquidating bankruptcy, the liquidation of the debtor's assets is conducted by the estate, and the income realized from that liquidation is taxed in the

hands of the estate, *before* ultimate distribution is made to creditors. In such a "typical" liquidating bankruptcy, the *net* assets remaining for distribution to creditors are thus *already reduced* by taxes before distribution occurs.[1] In the supposedly non-typical situation that the present case represents, "all or substantially all" of the assets of the estate are placed in the hands of a liquidating trustee who conducts the liquidation. In this situation, 26 U.S.C. 6012(b) ensures that precisely the same final result is accomplished as in the "typical" case: when the liquidating trustee liquidates the assets, realizes income, and then reports and pays the taxes owed on the income, the trustee will have the same *net* assets remaining for distribution to the creditors as the estate would have in the "typical" case.

By contrast, the result respondents seek would allow the income realized upon liquidation of a debtor's assets to escape effective taxation through the simple artifice of placing those assets in the sheltering hands of a liquidating trustee (appointed by the bankruptcy court) *before* liquidation. It is clearly illogical to suggest that Congress intended to allow liquidating trustees who receive "all or substantially all" of the debtor's assets to serve as a tax sheltering device to enhance net distributions for creditors in a bankruptcy case. Moreover, as we discuss next,

[1] Respondents seem to acknowledge (Smith Br. 26; Bank Br. 29-31) that, if the debtors' assets had been sold in a Chapter 7 liquidation, the trustee of the debtors' estate would have been required by 26 U.S.C. 6012(b) to pay taxes on the income realized in liquidation before making distribution to creditions. See 11 U.S.C. 704(1), 503(b)(1)(B), 507(a)(1). They also agree (Smith Br. 26; Bank Br. 29-30) that the same result would have occurred if the debtors' assets had been liquidated by a trustee appointed prior to confirmation of a Chapter 11 reorganization plan. See 11 U.S.C. 363, 1104, 1129(a)(1)(9)(A). Indeed, even in a typical reorganization, where the assets of the estate are revested in a reorganized debtor, the debtor makes payments to creditors under the plan in after-tax dollars.

respondents' claim is contrary to the plain language and consistent administrative construction of the statute.

2. a. Respondents contend that the liquidating trustee is not a "trustee in a case under title 11," as that term is used in Section 6012(b)(3). But respondents ultimately concede (i) that this is a "case under title 11," (ii) that the liquidating trustee was appointed as part of this "case under title 11," (iii) that the liquidating trustee continues to serve as a trustee in this "case under title 11," and (iv) that the liquidating trustee is, in fact, a "trustee." See Bank Br. 37, 41; Smith Br. 35-36. Respondents' sole rationale for their claim that Section 6012(b)(3) does not apply to the trustee appointed in this case is that the statutory phrase "trustee in a case under title 11" is a special "term of art" that conveniently excludes liquidating trustees. This contention is insubstantial.

It is telling that the trustee asserts that he *is* a trustee acting in "a case under title 11" for purposes of 31 U.S.C. 3713(a)(2), which he mistakenly claims immunizes him from any breaches of trust he may have committed (see Smith Br. 35 & n.31).[2] This concession emphasizes the transparent expediency of his conflicting assertion that he is not a "trustee in a case under title 11" for purposes of 26 U.S.C. 6012(b)(3), which requires him to report and pay taxes on the income he has received. We are offered no insight into why the phrase "trustee in a case under title 11" is a "term of art," but the phrase "trustee acting under title 11" is not.

The assertion that the phrase "trustee in a case under title 11" is a "term of art" is based by respondents on

[2] The trustee asserts that his liability as trustee is limited to the assets "remaining" in his hands. Smith Br. 34 n.31. He cites no authority for this proposition. In fact, his liability is at least co-extensive with the assets originally "placed" in his hands. See *Nicholas* v. *United States*, 384 U.S. 678, 694 n.28 (1966). If he has breached his obligation to pay taxes owed the United States, he cannot defeat recovery by the mere fact that he has paid estate assets improperly to third parties or to creditors. *Ibid.*

various provisions of the Bankruptcy Code that define the varying responsibilities of various types of trustees in various types of cases under Title 11 (see Bank Br. 29-31; Smith Br. 26). None of these provisions, of course, purports to define (or even address or consider) the phrase "trustee in a case under title 11." Indeed, the provision on which respondents principally rely refers only to persons "selected under section 701, 702, 703, 1104, 1163, 1302, or 1202 of this title to serve as a trustee in a case under this title" (11 U.S.C. 322(a)), which plainly indicates that Congress understood that there are *other* types of "trustees in a case under title 11" than those described in that provision.

The term "trustee" is not used in a uniform fashion throughout the Bankruptcy Code. In some instances, the phrase "trustee in a case under this title" is employed. See 11 U.S.C. 322. In other contexts, the term "trustee" stands alone. See 11 U.S.C. 327. In still others, the term "trustee" is used in connection with events that can occur only *after* a plan of reorganization is confirmed. See 11 U.S.C. 1123(b)(3). These many variations with which Congress has used the term "trustee" in the Bankruptcy Code refute respondents' unsupported claim that the phrase "trustee in a case under title 11" in Section 6012(b) of the Internal Revenue Code is a term of art. There is utterly no evidence in the legislative history of the statute to support respondents' novel view.

As our opening brief explains (Br. 18), the language of Section 6012(b) has long appeared in revenue statutes and has consistently been interpreted by the Treasury to have a far broader meaning than that claimed by respondents. The original statutory phrase "trustee in bankruptcy," which was supplanted by the phrase "trustee in a case under title 11" in 1980,[3] has consistently been

[3] Respondents acknowledge that the change in the statutory language does not affect the proper outcome of this case, for it "was merely a technical amendment to conform to the terminology of the new Bankruptcy Code." Smith Br. 27.

construed in revenue statutes in a broad and functional manner to include "a trustee, receiver, debtor in possession, *or other person designated as in control of the assets of a debtor in any bankruptcy proceeding by order of the court* in which such proceeding is pending." Treas. Reg. 103, § 19.274-1 (Internal Revenue Code of 1939) (emphasis supplied).[4] Moreover, as we have described in detail (Br. 16-17), the Treasury Regulations interpreting Section 6012(b)(3) and its predecessors have specifically interpreted the phrase "trustee in bankruptcy" to include "trustees in dissolution." See also *Central National Bank* v. *Commissioner*, 25 B.T.A. 1123, 1128 (1932). The language of this statute has never been interpreted by the Treasury as a "term of art" that refers only to a limited class of trustees specifically described in particular Bankruptcy Code provisions. Because the agency's contemporaneous and consistent administrative interpretations of this provision of the Internal Revenue Code "implement the congressional mandate in [a] reasonable manner," they should be upheld (*National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 476 (1979)).[5]

b. Respondents also err in their cramped interpretation of the terms "assignee" and "receiver" as they appear in Section 6012(b). According to respondents (Bank Br. 38-40, 42; Smith Br. 28), these terms have no application to this case because this is a bankruptcy case under

[4] Accord: Treas. Reg. 86, art. 274-1 (Revenue Act of 1934); Treas. Reg. 94, art. 274-1 (Revenue Act of 1936); Treas. Reg. 101, art. 274-1 (Revenue Act of 1938); Treas. Reg. 118, § 39.274-1(c) (1939 Code).

[5] This Court has repeatedly stated that when Congress has, in many reenactments of a tax statute, declined to override a contemporaneous and long-continued administrative construction, the agency's interpretation "must be deemed to have received congressional approval" and to have the effect of law. *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272, 283 (1966). See also *Helvering* v. *Winmill*, 305 U.S. 79, 82-83 (1938); *United States* v. *Dakota-Montana Oil Co.*, 288 U.S. 459, 466 (1933).

Title 11. The irony of this position is rather extraordinary. On the one hand, the trustee claims that he is not subject to Section 6012(b)(3) because he is not a trustee "in a case under title 11"; on the other hand, he claims that he is not subject to Section 6012(b)(3) because this is "a case under title 11" and the terms "assignee" and "receiver" therefore cannot apply. Respondents offer nothing in the statutory language or legislative history to support this implausible claim. Nor do they cite a single case which has so limited the broad provisions of Section 6012(b).

This Court has often stated that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain * * * the sole function of the courts is to enforce it according to its terms." *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). See also *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). For the reasons set forth in our opening brief (Br. 25-27), the terms "assignee" and "receiver" in Section 6012(b) should be interpreted in accordance with their ordinary meaning to encompass the liquidating trustee in this case. That ordinary interpretation of the statutory language reaches results "consistent with the context and purpose of" the statute (*Labor Board* v. *Highland Park Mfg. Co.*, 341 U.S. 322, 325 (1951)).[6]

[6] Contrary to the Bank's claim (Bank. Br. 41-42), affording these terms their ordinary meaning does not render the phrase "trustee in a case under title 11" superfluous. If the phrase "trustee in a case under title 11" has the restrictive meaning claimed by respondents, it would be reasonable to believe that Congress intended the phrase "assignee" or "receiver" to cover individuals not within the former designation, even if they obtained title or possession of a corporation's property in the context of a bankruptcy case. It is not reasonable to assume, as respondents would have it, that Congress meant to give an unnaturally restrictive meaning to the term, thereby leaving gaps to be exploited by inventive creditors.

c. Central to respondents' misconstruction of Section 6012(b)(3) is their repeated claim that the statute applies *only* when a fiduciary supplants corporate management and controls the operations of a debtor.[7] See Bank Br. 34-36; Smith Br. 23-25. This contention utterly lacks foundation. It is also flatly refuted by the fact that, in 1954, Congress expressly *eliminated* the preexisting statutory language that had made a fiduciary responsible for the corporate filing requirement only if he was "operating the business or property" of the corporation (see Br. 17 n.11). Section 6012(b)(3) now imposes that responsibility on fiduciaries and trustees "whether or not such property or business is being operated." 26 U.S.C. 6012(b)(3).[8] Respondents simply ignore—and by

[7] Respondents assert (Bank Br. 35-36; Smith Br. 31-33) that the corporate debtors have emerged from bankruptcy and are now being "operated" under their own management. It is true that they continue to litigate with the trustee; but they were left, under the Bank's plan, with nothing. That plan provided for transfer of all of the corporate debtors' assets to the liquidating trust (J.A. 41). Debtors' management was left in charge of the shell; the trustee had the assets. Under the circumstances, respondents' irrelevant assertion that the trustee has not "supplanted" corporate management is purely formalistic.

[8] See H.R. Rep. No. 1337, 83d Cong., 2d Sess. A396 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 563 (1954). In support of their argument, respondents rely (Bank Br. 41, Smith Br. 24-25) on that portion of this Court's opinion in *North American Oil* v. *Burnet*, 286 U.S. 417, 423 (1932), which states that the *predecessor* of Section 6012(b)(3) applied "when the receiver is in complete control of the properties and business of the corporation." Respondents fail to note, however, that this language refers to the statute as it existed prior to its amendment. Nothing in *North American Oil*, of course, suggests that the former "operational" requirement of the statute survives to this day. See Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws—Income Tax Liabilities of the Estate and the Debtor*, 72 Mich. L. Rev. 937, 943 (1974). Moreover, the receiver in *North American Oil* operated only one section of oil land "[a]mong [the] many properties" of the corporation. The Court's concern that there be a "substitution of the receiver for the corporation" and that the receiver be in "com-

ignoring fail to account for—the plain language of the statute.[9]

It has long been recognized that the statute this case involves does not make distinctions that turn on the breadth of the "discretion" afforded to the "trustee," "receiver" or "assignee." The authority of the persons who have been held responsible for taxes under Section 6012(b)(3) has been derived from a variety of sources: state statutes (*Hersloff* v. *United States*, 310 F.2d 947 (Ct. Cl.), cert. denied, 373 U.S. 923 (1963); *United States* v. *Loo*, 248 F.2d 765 (9th Cir. 1957), cert. denied, 356 U.S. 928 (1958)); federal statutes (*In re Joplin*, 882 F.2d 1507 (10th Cir. 1989); *In re I.J. Knight Realty Corp.*, 501 F.2d 62 (3d Cir. 1974); *United States* v. *Sampsell*, 266 F.2d 631 (9th Cir. 1959)); and deeds of assignment or trust (*Louisville Property Co.* v. *Commissioner*, 140 F.2d 547 (6th Cir.), cert. denied, 322 U.S. 754, 755 (1944); *First National Bank* v. *United States*, 86 F.2d 938 (10th Cir. 1936)). But the scope of authority conferred on these fiduciaries—beyond the basic authority to dispose of assets and invest proceeds—was not a point of importance in any of these cases. Rather, the relevant similarities between these fiduciaries were that they had possession of or title to the debtor's property and produced

plete control" of the corporate properties and business must be understood in that context. 286 U.S. at 420, 423. When Congress clarified the predecessor of Section 6012(b)(3) by deleting the operational requirement, it made clear that application of the statute depends on the *amount* of the corporate property in the hands of the fiduciary ("all or substantially all"), not the manner in which it is held.

[9] It is also significant that even the "statutory trustees" that respondents admit are subject to Section 6012(b)(3) do not always assume operational control of the debtor's business. For example, in a Chapter 11 reorganization, a trustee may operate the debtor's business "unless the court * * * orders otherwise." 11 U.S.C. 1108. Similarly, in a Chapter 7 liquidation, the court "may" authorize the trustee to operate the business of the debtor for a limited period of time. 11 U.S.C. 721; see *Commodity Futures Trading Comm'n* v. *Weintraub*, 471 U.S. 343, 352 (1985).

taxable income from that property. See *In re I.J. Knight Realty Corp.*, 501 F.2d at 66; *United States* v. *Sampsell*, 266 F.2d at 634-635. No more is required for Section 6012(b)(3) to apply.[10]

3. a. A separate taxable entity, the individual debtor's estate, was created when Mr. Gould filed for relief under Chapter 11. 26 U.S.C. 1398. At the same time, Mr. Gould continued as a taxpayer in his own right outside of bankruptcy. Although respondents appear to acknowledge that distinction (Bank Br. 22; Smith Br. 19), they incorrectly complain that the government's construction of Section 6012(b)(4) would shift to the liquidating trustee the responsibility for reporting income and paying taxes *of the individual* (Bank Br. 21; Smith Br. 21). We willingly join with respondent in tearing that straw man apart: Mr. Gould will continue to bear tax responsibility for his income. The liquidating trustee, by operation of Section 6012(b)(4), bears tax responsibility only for the income attributable to Mr. Gould's bankruptcy estate—income that the trustee, rather than Mr. Gould, received.

Contrary to respondents' assertion (Bank Br. 22-24; Smith Br. 20), the obligations of the liquidating trustee under Section 6012(b)(4) are not altered by the fact that Mr. Gould preceded the trustee as fiduciary of the bankruptcy estate prior to confirmation of the reorganization plan. In his capacity as debtor in possession, Mr. Gould held the property of the estate for the benefit of creditors, stepping into "the shoes of a trustee in every way." S. Rep. No. 989, 95th Cong., 2d Sess. 116 (1978). While he held that position, Mr. Gould was required by Section 6012(b)(4) to file returns on behalf of the es-

[10] See Sheppard, *When Bankruptcy Courts Take Tax Laws Into Their Own Hands*, 15 Tax Notes 158, 161 (Apr. 15, 1991) ("Under the express wording of section 6012, th[e] fiduciary does not have to be operating the debtor's business. He does not have to have the discretionary powers of a trustee appointed under section 1104(a) of the Bankruptcy Code. All the fiduciary contemplated by section 6012 has to do is hold title to substantially all of the debtor's business assets.").

tate.[11] But Mr. Gould's fiduciary control over the estate property terminated when the plan was confirmed and the property was transferred to the liquidating trust. The returns and taxes at issue in this case were due *after* Mr. Gould's tenure as fiduciary of the estate and during the tenure of the liquidating trustee.

b. Respondents claim that Section 6012(b)(4) does not obligate the liquidating trustee to file returns of income generated by property he has held in the liquidating trust because the liquidating trustee is not a fiduciary of a bankruptcy "estate." According to respondents, even though all of the property of Mr. Gould's estate passed to the liquidating trustee to hold and administer after confirmation of the reorganization plan, the estate ceased to exist (Bank Br. 23; Smith Br. 20). As the sole statutory support for this critical proposition, respondents cite 11 U.S.C. 1141(b), which states:

> (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

Although it would seem plain enough on the face of this provision that it does not dictate the end of the bankruptcy estate when, as in this case, confirmation of the reorganization plan does *not* vest all of the property of the estate in the debtor, respondents urge that such is "settled law" (Smith Br. 20 n.17). The cases cited by respondents (Bank Br. 23 n.19; Smith Br. 20 n.17), however, only confirm that 11 U.S.C. 1141(b) implies nothing of the sort.[12] Of the eleven bankruptcy and district court cases upon which respondents rely (they cite no higher authority), all but one involved plans that called for all

[11] At the same time, he remained responsible for filing returns on his own behalf as an individual taxpayer.

[12] We note that the debtors also seem to assume that plan confirmation terminates the estate (Holywell Br. 30 n.34), but they also offer no pertinent authority on the matter.

of the estate property to vest in the debtor.[13] See, *e.g.*, *In re Westholt Mfg., Inc.*, 20 B.R. 368, 372 (Bankr. Kan. 1982) ("At confirmation, all the property of the estate is vested in the debtor, *thereby* terminating the estate's existence * * *.") (emphasis added), aff'd *sub nom. United States* v. *Redmond*, 36 B.R. 932 (D. Kan. 1984); *In re T.S.P. Industries, Inc.*, 120 B.R. 107, 109 (Bankr. N.D. Ill. 1990) (when estate property vests in debtor, "title to property revests in the debtor along with normal ownership rights and is then no longer property of the estate") (internal quotation marks omitted). Where the plan provides that property of the estate is to be transferred to another fiduciary for administration, neither 11 U.S.C. 1141(b) nor the cases construing it suggest that the estate ceases to exist.

Indeed, the Bankruptcy Code explicitly provides that a fiduciary may continue to hold and administer property of the estate *after* a plan is confirmed. Under 11 U.S.C. 1123(b)(3), a plan may provide for "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose," of "any claim or interest belonging to the debtor or to the estate." The Bankruptcy Code thus plainly contemplates that the estate may continue to exist and be represented by a fiduciary after confirmation. See *Duvoisin* v. *East Tennessee Equity, Ltd. (In re Southern Industrial Banking Corp.)*, 59 B.R. 638, 642 (Bankr. E.D. Tenn. 1986); *In re T.S.P. Industries, Inc.*, 120 B.R. at 109 n.2 (describing debtor's additional fiduciary responsibilities when "property of the estate remain[s] property of the estate after confirmation").

[13] In the remaining case, *In re Sonner*, 53 B.R. 859 (Bankr. E.D. Va. 1985), the bankruptcy court merely invoked 11 U.S.C. 1141(b) and recited that the estate was "terminated," notwithstanding that the estate property was transferred to a creditors' trust and was not revested in the debtor. See 53 B.R. at 864. That unexamined conclusion is, we submit, wrong.

In the present case, Mr. Gould was not revested with the estate property upon confirmation. Instead, the estate, in its entirety, passed to the liquidating trustee. From the time of that transfer, Section 6012(b)(4) requires the trustee, not Mr. Gould, to file returns reflecting the income of the estate.

4. The Bank tacitly admits (Bank Br. 47) that it was its secret intent from the outset to subvert the trustee's statutory duty to pay federal income taxes by proposing a plan of liquidation that made no express provision for the payment of taxes. The trustee, however, was obviously unsure that the Bank's hidden agenda had been accomplished, for he commenced this adversary proceeding in the bankruptcy court to obtain a determination whether he should report and pay taxes, as 26 U.S.C. 6012(b) and 6151 expressly require.[14] The trustee now asserts (Smith Br. 46), however, that the courts below held that the plan of liquidation positively does not permit payment of taxes and that it is therefore too late for the government to demand his compliance with the tax laws. This argument is demonstrably unsound.

a. In respondents' view (Bank Br. 15; Smith Br. 44-46), unless the plan specifically provides that the trustee is to obey the law by filing returns and paying taxes, the trustee is not only free, but is *required*, to ignore those obligations. That startling assertion ignores the rather basic fact that the Bankruptcy Code does not grant the trustee "*carte blanche* to ignore nonbankruptcy law." *Midlantic Nat'l Bank* v. *New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 502 (1986). In particular, nothing in the Code authorizes a "trustee in a case under title 11" (26 U.S.C. 6012(b)(3)) to ignore his specific statutory duty to report and pay taxes.

The plan of reorganization, in any event, lends no support to respondents' claim. The plan does not state that

[14] See *King* v. *United States*, 379 U.S. 329, 338-339 (1964) (trustee personally liable for failing to seek amendment to plan to pay taxes).

the debtors, rather than the trustee, will report and pay taxes on the income generated by the trust.[15] Indeed, to the extent the plan suggests anything regarding the trustee's tax responsibilities, it empowers him to pay and discharge all lawful claims against the trust assets and provides that "[a]ll * * * obligations incurred by the Trustee in administering the Trust or in any manner connected, incidental or related thereto, shall be a charge against the Trust Property" (Pet. App. 9a). Since the trustee's duties to report and pay taxes under 26 U.S.C. 6012 and 6151 create a valid "charge against the Trust Property," the plan in this manner provides a direct basis for the trustee to pay the taxes as required by law. In this context, the absence of an IRS objection to the proposed plan is hardly remarkable.[16]

The standard procedure for collection of post-petition taxes is for the trustee to file returns and pay the tax

[15] The proponent of a plan is not entitled to remain silent about the tax consequences that it believes will result from liquidation of property under the plan, particularly if it takes the position that the taxes will be borne by persons other than those to whom the debtor's assets are to be transferred. See *In re Haukos Farms, Inc.*, 68 B.R. 428, 434 (Bankr. D. Minn. 1986). In marked contrast to his current posture, the liquidating trustee at one time viewed the Bank's failure to disclose its intentions regarding who was to bear the tax burden on income and gains generated by the trust as "a material act of omission" (II C.A. App. Tab J, Tr. 91).

[16] The trustee errs (Smith Br. 46) in faulting the IRS for failing to file a proof of claim with respect to tax liabilities arising out of the trust administration. Under its longstanding procedures, the IRS files proofs of claims for a debtor's pre-petition tax liabilities, as it did in this case. But the claims for liabilities generated by the liquidating trust are not pre-petition claims. Indeed, taxes on the post-petition gains and investment income received by the trust were not even due when, on October 10, 1985, the plan was implemented by sale of the Miami Center. Since the IRS could not have filed a claim for the taxes at issue before the plan was implemented, the Bank and trustee could hardly have relied on the lack of such a claim in implementing the plan.

reported due, as 26 U.S.C. 6012 and 6151 require. Our system of taxation depends upon such self-assessment. *Commissioner* v. *Lane-Wells Co.*, 321 U.S. 219, 223 (1944). Once the return is filed by the trustee, the Internal Revenue Service may request payment of any amount not paid with the return as an expense of administration. It may also select the return for audit and, if it finds a deficiency, may request payment of the deficiency on the same basis. The fact that the IRS has not yet formalized its claim against the trust for post-petition income in this case reflects only the failure of the trustee to file required returns, not a breakdown in internal procedures on the part of the IRS.[17]

In any event, as the court of appeals recognized (Pet. App. 7a), the government does not seek to alter the plan, but only to require the trustee to abide by applicable law and pay the taxes due under the provisions of the plan. Nor is there any unfairness in what the trustee perceives as his current predicament.[18] The trustee could have

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[17] Respondents complain (Bank Br. 43-44; Smith Br. 10 n.10, 43) that there is no basis in the record for estimating the taxes that may be due in this case. Although the amount of that liability is not directly relevant to the question of who must file returns and pay the tax (and was therefore never addressed in the adversary proceeding below), we indicated in our opening brief that the amount of taxes and interest owing for Holywell's 1986 tax year would be substantial (Br. 6 n.4). In the absence of any return, the revenue agent has now completed a draft report of his audit of Holywell and its subsidiaries for the years 1986 through 1991. Copies of the report have been released to Holywell and the trustee. The report indicates that the total liability for the consolidated group for the 1986 tax year, with interest to October 8, 1991, exceeds $32,293,000.

[18] Respondents claim (Bank Br. 20; Smith Br. 30-31) that the trustee would be faced with a "virtually impossible task" if required to file consolidated returns on behalf of the debtor corporations because only some of the companies in the consolidated group (of which Holywell Corporation is the parent) filed for bankruptcy. This practical concern, of course, has nothing to do with any legal issue in this case: the trustee's lot here is no different from that of

taken more adequate steps to resolve any doubts he harbored about his obligations under the plan and under the Internal Revenue Code. He should, of course, have brought this proceeding *before* he began to distribute trust proceeds. His failure to take appropriate action to escrow or pay the taxes due (and seek a refund, if appropriate), and his actions in disbursing funds prior to a final judgment in this case, cannot be blamed on the IRS.[19]

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the "statutory trustees" that respondents readily admit are subject to the requirements of Section 6012(b).

In any event, the difficulties that respondents claim the trustee will have in complying with Section 6012(b) are largely illusory. Respondents neglect to point out that the stock of the subsidiaries that did *not* file for bankruptcy is part of the corpus of the liquidating trust. Moreover, under the Treasury's consolidated return regulations, the parent corporation is "the sole agent for each subsidiary in the [consolidated] group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year." Treas. Reg. § 1.1502-77(a). Congress anticipated that the trustees of parent corporations would need to obtain information to meet corporate filing responsibilities and specifically authorized the Internal Revenue Service to provide a "trustee in a title 11 case" or a "receiver" possessing substantially all of a taxpayer's assets with information regarding prior returns filed by a taxpayer. 26 U.S.C. 6103(e)(4). If the trustee regards his difficulties as insurmountable, he may seek leave from the Commissioner to discontinue filing consolidated returns "for good cause" under Treasury Regulation Section 1.1502-75(c)(1)(i). The factors taken into account in determining whether "good cause" exists include "[c]hanges in law or circumstances, including changes which do not affect Federal income tax liability." Treas. Reg. § 1.1502-75(c)(1)(iii)(A).

[19] See also note 2, *supra*. The trustee is not without means to attempt to alleviate his predicament. As he mentions (Smith Br. 12 n.13), the bankruptcy court did not reach his "contingent allegation" that the Bank was responsible for misleading him, and he may be able to recover from the Bank on that basis. The trustee could also seek to recover payments he made to the Bank and other creditors in excess of their proper share of the net distribution available after taxes are properly paid. See *Danning* v. *General Motors Acceptance Corp. (In re Jules Meyers Pontiac, Inc.)*, 779 F.2d 480 (9th Cir. 1985); *In re Crotts*, 87 B.R. 418, 421 (Bankr. E.D. Va. 1988); *In re Kelderman*, 75 B.R. 69 (Bankr. S.D. Iowa 1987).

b. Respondents claim (with no small irony) that the result in this case could have been avoided by greater vigilance on the part of the IRS in policing the plan confirmation process (Bank. Br. 46; Smith Br. 44). The statute, however, places this duty of vigilance on the trustee, not the government. Moreover, the court of appeals' decision has the potential for great mischief. The court of appeals has constructed out of whole cloth a new tax-exempt entity—the liquidating trust—that creditors may use to maximize their distributions in bankruptcy at the expense of the public fisc. Although respondents shrink from our characterization of this as a "tax loophole," this label perfectly describes a statutory construction that leaves the government with only the hollow right of seeking payment of taxes from the debtors *after* the creditors have obtained *all* the debtors' assets by transferring them to the liquidating trust.[20]

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

OCTOBER 1991

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[20] The Bank would take the government to task for noting that the debtors "evidently lack funds" to satisfy their substantial tax liabilities (Bank Br. 44-45). The Bank maintains that there is "no evidence in the record" to support that assertion. To the contrary, the record is quite clear that the confirmed plan placed *all* the corporate assets in the liquidating trust, *including* the stock of the non-debtor subsidiaries. Since "all" of their assets were taken, it seems a fair inference—indeed a rather obvious inference—that these debtors "lack funds" to pay the taxes on the income the *trustee* received.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HOLYWELL CORPORATION, *et al.*,
Petitioners,
v.
FRED STANTON SMITH, *et al.*

UNITED STATES OF AMERICA,
Petitioner,
v.
FRED STANTON SMITH, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONERS HOLYWELL CORPORATION, *ET AL.*

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REPLY BRIEF FOR PETITIONERS HOLYWELL CORPORATION, *ET AL.*

INTRODUCTION

Respondents Smith and Bank of New York ("Bank") claim that the Bank's so-called "Plan of Reorganization" worked just as intended. The liquidating trustee was, they say, under no obligation to file tax returns or to pay any taxes. He was free to hold title to, liquidate, and distribute *all* of the debtors' assets, and to receive and distribute *all* of the income earned on those assets, without concern for federal capital gains or other income taxes. All that we may have here, they contend, is a little collection problem. In order to make this argument, they must tell an extended fairy tale.

That tale is that the Plan here was just a plain old corporate reorganization—and that when the Plan was confirmed, the corporations and Gould were sent forth to continue their operations just as before. We are supposed to think of the classic business reorganization in which new capital is infused and debts are stretched out or written down to manageable proportions so that they may be carried, going forward, by the "reorganized debtors," with perhaps a dollop of equity to the creditors to make up for the readjustment.

This Plan was nothing of the kind. It was a plan of *liquidation.*[1] As in any Bankruptcy Code liquidation, such as those under chapter 7, all of the nonexempt assets of the debtors were taken from them and used to pay creditors. Under the Plan, Smith became the owner of all their assets—he was vested with title to all of the property of the debtors' estates, sold the property in his own name,

[1] "Chapter 11 permits a plan of reorganization to provide for the sale of all or substantially all of the property of the estate. Such a liquidating plan enables a chapter 11 case to resemble closely a case under the liquidation chapter of the Code, chapter 7." 5 *Collier Bankruptcy Practice Guide* ¶ 90.04[4] at 90-24 (Asa S. Herzog & Lawrence P. King eds., 1991) (footnote omitted).

invested and rèinvested the proceeds, and made distributions to creditors. J.A. 41; Pet. App. 3a, 19a, 30a. There was no forbearance exacted from the creditors, no scaling down of debts, no provision for debts to be paid only later out of the continued operations of the debtors, and no new capital contributed to finance ongoing business operations. The creditors were to be paid in full, with pre- and post-petition interest. The plan operated as a liquidation of the debtors' property, just as in the case of a conventional bankruptcy trustee acting under chapter 7 of the Code or by the debtors themselves as debtors-in-possession under a chapter 11 "liquidating plan."

But there was a key exception. Federal income taxes on the liquidation process were not to be paid! Rather than being afforded administrative expense priority under section 507 of the Bankruptcy Code, these taxes were—by the stroke of a pen—to be afforded no priority at all; indeed, no provision whatever for their payment was made. The clear intent of the Plan's sponsor was that the "reorganized debtors"—a couple of corporations reduced to shells and Gould, stripped of his assets—were supposed to pay the taxes. Instead of the taxing authorities being paid "off the top," they were to be paid off the bottom; and it was not planned that there would be anything at the bottom.

SOME OBSERVATIONS ON THE RESPONDENTS' STATEMENT OF THE FACTS

The Respondents' briefs both tell the same story about the supposititious "corporate reorganization."[2] We have

[2] Although Smith describes himself as a "stranger to the affairs of the debtors," Smith Br. 2, he certainly caught on fast. In October 1985, he demanded and received from the Bank an indemnity with respect to his actions as liquidating trustee. His then-counsel testified that Smith demanded the indemnity as protection from claims for the unpaid federal taxes at issue in this case. J.A. 168-71. Smith's substantive arguments after getting the indemnity have been closely aligned to those of the Bank, at least since his original counsel was replaced. Smith claims that we are making the argument that he is subject to personal liability in order to make him

quoted to us the rule that "the confirmation of a plan vests all of the properties of the estate in the debtor," Smith Br. 20 n.17, and are told that the debtors were "expected" to receive a substantial "residue." Bank Br. 20, 45. We are told that the Plan "assumed that after confirmation the individual and corporate debtors would conduct their own affairs," Smith Br. 6, and "continue to carry on business." Bank Br. 10. Finally, we are told that the liquidating trustee was simply "administer[ing] a fund," the contents of which we are not reminded of, "while regular corporate management continues to manage the corporation's business." Smith Br. 28, Bank Br. 19-20, 34. None of these elements of Respondents' "reorganization" fairy tale withstands scrutiny.

1. *"Continued Existence"*—We are told by Respondents that "like most plans of corporate reorganization, the Plan contemplated the continued existence of the corporate debtors." Smith Br. 31. In fact, the Plan contemplated the *liquidation* of the corporate debtors. Their continued technical existence as shell corporations, without assets, seems to have been the conceptual underpinning of the scheme which is now urged on this Court.[3]

We are presented with a list of the debtors' interests in "nonrelated businesses" (Bank Br. App.) and presumably invited to draw the inference that these interests did not pass to the liquidating trustee, but were retained by the "reorganized debtors." But under the Plan, they in fact passed to the liquidating trustee. Indeed, if the nondebtor corporations, the stock in which was acquired

"fear for his personal assets" in connection with his administration of the trust. Smith Br. 34. Obviously, his fear dates back to 1985, and was presumably soothed by the Bank's indemnity agreement. He has invoked the Bank's indemnity in this adversary proceeding. Complaint ¶ 18 (Smith Br. in Opp. 4, 6a).

[3] We are told that the corporate debtors have "of course retained whatever property they have accumulated since confirmation." Smith Br. 31. How shell corporations without assets go about "accumulating" property, we are not told. They have no wealthy uncles to leave them any.

by the trustee under the Plan, had any substantial assets, the liquidating trustee helped himself to them,[4] and used them to pay the creditors of one of the debtors, MCLP. No effort was made to pay Holywell's consolidated income taxes due the United States.[5] Although Smith makes the unsupported assertion that he "has been denied access to the assets of the nondebtor subsidiaries," Smith Br. 23, the truth is that he has, from the very beginning (and as contemplated by the Plan), seized control of *all* the assets of Holywell and its nondebtor subsidiaries.[6] Perhaps most misleading of all, Respondents speak repeatedly of the possibility of a "return" of the trust's "residue" to the debtors. Bank Br. 3, 4, 7, 16, 20, 45; Smith Br. 31.[7] Those suggestions are directly contrary to Respondents' contemporaneous representations to the bankruptcy court that there would be *no* assets left for the debtors.[8]

[4] *See, e.g., Olympia & York Fla. Equity Corp.* v. *Bank of N.Y. (In re Holywell Corp.)*, 913 F.2d 873, 879-81 (11th Cir. 1990) ("the trustee acquired Gould's interest in" the joint venture); *Olympia & York Fla. Equity Corp.* v. *Bank of N.Y. (In re Holywell Corp.)*, 874 F.2d 780, 781 (11th Cir. 1989) ("all of the debtors' property was transferred to the liquidating trustee"), *cert. denied*, 110 S. Ct. 725 (1990); *Holywell Telecommunications Co.* v. *Bank of New York (In re Holywell Corp.)*, No. 85-3431, slip op. at 8-9 (S.D. Fla. May 24, 1989) ("the Liquidating Trustee . . . obtained Holywell's right to acquire the assets of [two Holywell subsidiaries] either by liquidating the two corporations or causing them to distribute a dividend to the Liquidating Trust"), *appeal dismissed*, 923 F.2d 865 (11th Cir. 1991).

[5] This notwithstanding the fact that, as Respondents acknowledge, these nondebtor wholly-owned subsidiaries of Holywell were severally liable to the United States with their debtor parent to pay the income taxes resulting from the "economic activity" being conducted by the liquidating trustee. The amounts trumpeted by Respondents (Smith Br. 5; Bank Br. 4) as paid to the United States by the liquidating trustee were for *payroll* taxes, not income taxes.

[6] *See* Order Approving Liquidating Trustee's First Report In Conjunction With Consummation Of Confirmed Plan (November 26, 1985) (Bankr. C.P. No. 1087) (showing the trustee in possession of all cash of Holywell's nondebtor subsidiaries). Time and again, the trustee has successfully asserted that he "owns" all assets of the debtors' estates, including Gould's interests in partnerships that were not themselves debtors and the accounts receivable of Holywell's nondebtor subsidiaries. *See, e.g., Olympia & York Fla. Equity Corp.* v. *Bank of N.Y. (In re Holywell Corp.)*, 913 F.2d at 879-81; *Holywell Telecommunications Co.* v. *Bank of New York (In re Holywell Corp.)*, No. 85-3431, slip op. at 8-9. To rebut these indisputable facts, the trustee points to a single, interlocutory court decision that, he admits, leaves unresolved his right to certain settlement proceeds. Smith Br. 7 n.6.

2. *"Separate Life"*—Smith relies on three anecdotes in an attempt to demonstrate a "separate life" of the debtors (Smith Br. 6-9); the Bank points to the same "evidence" in an effort to show that the debtors' "expectations" were that they would somehow resume "nor-

[7] This theoretical possibility is equally available under a chapter 7 liquidation. *See* 11 U.S.C. § 726(a)(6).

[8] On August 8, 1985—the day the Plan was confirmed—counsel for the Bank outlined the Plan's classification scheme to the bankruptcy court, explaining that Holywell's nondebtor subsidiaries would be paid only if there were money left over from the payment of all other creditors. Transcript (August 8, 1985) at 29 (Bankr. C.P. No. 908. Counsel then engaged in the following colloquy:

> THE COURT: What is going to happen to class 8 [the nondebtor subsidiaries], are they going to get anything or not?
>
> MR. SALTER: It appears to me, from the economics that I have seen, that they will not get anything—
>
> THE COURT: But you can't be certain?
>
> MR. SALTER: —but you cannot be certain because there are some very large claims, $6.1 million for Trusthouse Forte, and no one here knows exactly where that is going to shake out.

Id. at 29-30. Needless to say, the prospect of the *debtors* receiving a "residue" was even more remote. Indeed, on October 21, 1985, counsel for the Bank and the trustee each reaffirmed their views that Holywell was nothing but a "shell" and "an entity devoid of all of its assets." Transcript of that day at 9-12 (Bankr. C.P. No. 1061). Indeed, when the bankruptcy judge asked "[i]s there anything that would restrict or prevent [Gould] from continuing to do business under the name Holywell," counsel for the Bank explained that Gould could not do so because the Plan contemplated the trustee's possession of 100 percent of the stock and 100 percent of the assets of Holywell and its subsidiaries. He suggested, as an alternative, that Gould might wish to acquire the name "Holywell" from the trustee and use it to start a *new* company. *Id.* at 9-10.

mal economic activity" and pay the taxes on the trustee's liquidation activities from income realized from their new endeavors (those endeavors themselves, of course, also being taxable). Besides being irrelevant, this is unsupported nonsense.

First, respondents make much of the debtors' continued litigation (orchestrated by Gould and conducted in his own name, often *pro se*, and that of the corporations), as if these legal attacks on the Plan—and on what Respondents were doing under it—were somehow indicia of economic activity. Smith even annexes to his brief a complaint in a lawsuit against him by one of Holywell's nondebtor subsidiaries, Twin Development. Smith neglects to say that the outcome of that lawsuit was yet another reconfirmation that Smith—not Holywell or Gould—had "complete control" over Holywell's nondebtor subsidiaries. The district court held that "the trustee, having within the proper jurisdiction of the bankruptcy court all the capital stock of Twin, had the ultimate *complete control* of Twin Development. . . . That the course of dissolution was not undertaken may well have been because arrangements had been made to sell all of Twin Development's assets, with the remainder of the sales proceeds, after payments of debts and charges, being held in cash. The Plan of Reorganization required that remainder to be paid over to the trustee." *Twin Development Corp.* v. *Smith*, No. 87-0037-C, slip op. 12-13 (W.D. Va. November 15, 1988) (Ex. A to Dist. Ct. Doc. No. 33) (emphasis added).

Second, Respondents make the erroneous claim that the trustee cannot file the tax returns because the debtors have not provided Smith with the requisite financial records, and lament that the Plan granted the trustee "access to their records *only* 'regarding objections to claims.'" Smith Br. 6, 16, 31 (emphasis added); *accord* Bank Br. 4. In fact, the Plan requires the debtors to "comply from time to time with the reasonable requests of BNY, the Trustee[] and the Creditors Committees," J.A. 48, and to "take any and all actions" requested by the Bank

or the trustee, "whether or not specifically enumerated herein." J.A. 50, 48. And the bankruptcy court gave the trustee authority to "[r]eview and copy all books and records of the debtors and their respective subsidiaries, including all records relating to receipts and disbursements, all bank statements, checkbooks, ledgers, and other financial data." Order Appointing Trustee, App. 2a. The trustee undertook such review before the effective date of the Plan.[9] Moreover, as the 100 percent stockholder of these corporations, the trustee has the statutory right to demand access to their books and records.[10]

Third, Smith and the Bank point to the debtors' efforts to get the trustee to pay the taxes, quoting out of context two letters from Mr. Gould and one of his associates. Smith Br. 8-9, 32; Bank Br. 5, 17. These, they say, demonstrate the assetless debtors' "independence" and their "expectation" that they, and not the trustee, were to be responsible for the taxes.[11] The parties' state of mind is beside the point. The question before the Court

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[9] More recently, during the course of the Internal Revenue Service's examination of Holywell, the trustee's counsel requested information concerning the examining agent's determination of potential tax liabilities. *See* Bank Br. 44 n.40; Smith Br. 10 n.10. Counsel for Holywell repeatedly wrote to counsel for the trustee advising her that the trustee's representatives were free to examine Holywell's books and records. The trustee never acted on this oft-repeated invitation. The Internal Revenue Service has now completed its examination and provided copies of the revenue agent's final report on Holywell and its consolidated subsidiaries to the trustee; that report, the summary of which is reproduced as Appendix B, shows a federal tax liability of $21,641,190, exclusive of interest or any penalties, for the taxable years 1986 through 1991; the report also contains consolidated income statements for those years confirming that substantially all the consolidated group's income has been interest earned on assets in the hands of the trustee.

[10] Del. Code Ann., tit. 8, § 220 (1988); Fla. Stat. Ann. § 607.1601 to .1604 (West Supp. 1991); S.C. Code Ann. § 33-16-102(a) (Law. Coop. 1990); Va. Code Ann. §§ 13.1-771 to -773 (Michie 1989).

[11] The same is said to be true of the debtors' filing of Holywell's 1985 tax return shortly after Smith filed the complaint in this action, in an effort to identify the taxes at issue in the lawsuit.

is whether the applicable statutes require the trustee to file the returns and pay the taxes. In addition, Respondents' assertions about the debtors' state of mind are incorrect. Respondents point to no findings below to support those assertions; there were none.[12]

3. *"Disbursing Agent" Revisited*—The final element of Respondents' fairy tale is the notion that the trustee was a "limited-purpose fiduciary" (Bank Br. 38) whose "real task" was only to hold "specified assets" and "pay claims." Bank Br. 10, 38; Smith Br. 5, 30. The trustee was, as we have explained, vested with title to all property of the debtors' estates. He sold the bulk of that property in his own name. J.A. 168-69. He settled litigation between the bank and the debtors.[13] He possessed a full panoply of powers, J.A. 41-45, including the "absolute" power "to act or otherwise deal" with all property of the estates. He needed that power to sell the debtors' property, and he exercised it.

4. *The "Collection Problem"*—The Respondents, each in closing their briefs, say that the government's "collection problem" could have been prevented had it been a little more vigilant in objecting to the Plan. Smith Br. 43-48; Bank Br. 43-49. But if, as they say, the Plan's intent was lawful, what would there have been to object to? More fundamentally, the trustee cannot avoid the statutory obligations imposed on him when he assumed his office—whether or not the United States objected to the Plan from which he derived his powers. Respondents' arguments are vestigial of the "mootness" argument made below and in the opposition to certiorari; that right or wrong, it is too late to complain now about what is revealed to be the true intent of the Plan or to apply the clear statutory mandate.[14]

[12] In truth, the documents demonstrate Gould's overriding concern that the reporting and payment of the federal income taxes be addressed responsibly by the trustee. For example, one such document is quite explicit in lamenting the trustee's stonewalling: "I do not understand how seventeen months have elapsed and this tax matter is still considered an open question and not resolved." J.A. 165; *see also id.* 166-67.

[13] *Holywell Corp.* v. *Bank of N.Y. (In re Holywell Corp.)*, 59 B.R. 340, 351 (S.D. Fla. 1986), *vacated sub nom. Miami Center Ltd. Partnership* v. *Bank of N.Y.*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988).

ARGUMENT

This is a case controlled by multiple, overlapping acts of Congress regardless of the terms and intent of the Plan. Those statutes make the trustee a trustee for the United States with regard to the taxes at issue. *See* Holywell Br. 23. In our opening brief, we suggested that the Court rest its decision on the broadest of the applicable statutes, in order to give the taxing authorities effective relief in this case and to prevent replication of the present scheme in other cases. We therefore placed emphasis on section 960 of the Judicial Code, and on the Absolute Priority Statute, 31 U.S.C. § 3713, as well as on I.R.C. § 6012(b) and particularly on the term "assignee" in subsection (3).[15] Thirty-two States, the District of Columbia and the City of New York joined together to make clear their concern that an affirmance "will threaten the public fisc of the States," *Amici* Br. 2 n.1, and suggested that the Court rest its holding on section 960 be-

[14] Smith has not withdrawn his assertion that this Court "lacks jurisdiction because the issue is moot." Smith Br. in Opp. 1. And the Bank's argument on this point echoes almost word for word its "mootness" argument in opposition to certiorari, except that the Bank now fails to cite a single case in support of this argument. *Compare* Bank Br. 43-49 *with* Bank Br. in Opp. 12-16. For the reasons we set forth in our opening brief at pages 38-47, Respondents' reclothed "mootness" argument should be rejected.

[15] The applicability of section 960 was argued to the bankruptcy, district and appeals courts. *See* J.A. 91 (argument of counsel for the trustee that section 960 is inapplicable under now-overruled Eleventh Circuit precedent); Pet. App. 26a (district court's rationale for declining to apply section 960). Section 3713 was also pressed on those courts. *See* J.A. 89; Dist. Ct. Doc. 18 at 11; Court of Appeals Brief for Appellant United States (September 20, 1989) at 21. Smith's contention that the applicability of these statutes was "not pressed on the courts below" (Smith Br. 16) demonstrates a lack of attention to the record endemic in Respondents' briefs.

cause its plain language is even broader than that of section 6012(b). *Id.* at 4-5, n.2.[16]

1. *Section 960*—Section 960 subjects "[a]ny officers and agents conducting any business under authority of a United States court" to "all Federal, State and local taxes." Section 960, which is "plain on its face," embodies Congress' "express mandate" that the "paramount federal interest" in bankruptcy cases is the payment of "current tax obligations" in the ordinary course by court officers. *New Jersey* v. *Reading Co.*, 451 U.S. 918, 918-20 (1981) (Rehnquist, J., dissenting from denial of *certiorari*). Recently, the Court examined the language and legislative history of this statute in the context of state taxes imposed on the bankruptcy liquidation process and reaffirmed that its plain language requires the trustee "to pay rather than litigate these tax claims." *California State Bd. of Equalization* v. *Sierra Summit, Inc.*, 490 U.S. 844, 852 n.9 (1989). Since Smith's liquidation activities constitute "conducting any business" within the meaning of section 960, *id.* at 853, he is "subject to all Federal . . . taxes . . . to the same extent as if such business were conducted by an individual or corporation." 28 U.S.C. § 960. Sections 1 and 11 of the Internal Revenue Code impose federal tax on the income of individuals and corporations; by operation of section 960, Smith is "subject to" that tax on his liquidation activities. *See Nicholas* v. *United States*, 384 U.S. 678, 693-94 & n.27 (1966).[17]

[16] We do not disagree with the arguments made by the United States, but suggest that repetition of the scheme employed here through various mutations would be discouraged by taking the broader grounds which we underline: § 960; the broader of the language alternatives in § 6012(b)(3) and (4); and § 3713. As to sections 6012(b)(3) and (4), if the Court finds that the trustee falls both under the coverage of the references to title 11 trustees in those two subsections and under the more general language in them, the trustee should be estopped from claiming that he is a trustee in a case under title 11 and subjected to the consequences of falling under the broader language. *See* p. 20, *infra*.

[17] The lower courts have also recognized that section 960 imposes obligations on federal court officers to pay applicable *federal* taxes, such as the income taxes at issue here. *In re Samuel Chapman, Inc.*, 394 F.2d 340, 342 (2d Cir.), *cert. denied*, 393 U.S. 923 (1968); *Southern Ry.* v. *United States*, 306 F.2d 119 (5th Cir. 1962) (J. R. Brown, J.); *In re Inland Gas Corp.*, 241 F.2d 374, 384 (6th Cir.) (Martin, J., concurring), *cert. denied*, 355 U.S. 838 (1957). The two contrary cases cited by Smith (Smith Br. 40) erroneously made the distinction between "liquidating" and "conducting" business recently rejected by this Court in *Sierra Summit*. 490 U.S. at 851.

Respondents skip over the language of the statute and go directly to what they claim to be its "purpose," observing that section 960 was passed to "eliminate immunity for judicial officers" from state taxes and therefore has no bearing on federal taxes. Smith Br. 39-40; Bank Br. 42. It is so that the statute was first enacted (in a different form) to eliminate such immunity and originally applied only to "state and local" taxes. But Respondents ignore the amendment to the statute in 1948. That amendment added "Federal" taxes to the statute's coverage. Respondents' interpretation of the statute as negating "intergovernmental immunity" with respect to *federal* taxes cannot be correct, for there can be no intergovernmental immunity from federal taxes for a federal officer.

For the same reason, Respondents' attempt to distinguish *Sierra Summit* is unavailing. While it is true that *Sierra Summit* involved a claim of immunity from state taxes, the Court discussed how the statute is to be "[r]ead most naturally," what its "plain meaning" is, and whether it is to be applied to "the liquidation process." 490 U.S. at 851-53. The Court's careful elucidation of the meaning of the statute's "plain language," 490 U.S. at 853, is equally applicable to a situation like this one, where federal taxes are to be imposed on the income earned by a federal court officer conducting a liquidation. *See Nicholas* v. *United States*, 384 U.S. at 693-95 & n.27.

2. *The Corporate Debtors and Section 6012(b)(3)*—Section 6012(b)(3) requires the trustee to file the tax returns of the debtor corporations and, by operation of

section 6151(a), pay their taxes.[18] Most simply, he is an "assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, [who] has possession of or holds title to all or substantially all the property or business" of Holywell. The Bank concedes that the courts have applied section 6012(b)(3) to the process of "corporate liquidation" and that "[a] liquidating corporation continues in existence for tax purposes . . ., and section 6012(b)(3) ensures that its return will be filed by the fiduciary in charge of its affairs, variously termed a 'liquidating receiver,' a 'trustee in dissolution,' or a *'liquidating trustee.'*" Bank Br. 38 (emphasis added). The Bank's argument that this provision is inapplicable here derives from its assertion that the corporations "have not been liquidated." Bank Br. 41. But that is a fundamental misrepresentation of the Plan's terms and effects. *See* pp. 2-8, *supra*. Once it is understood that Smith's duty was, in fact, to "hold, *liquidate*, and distribute" *all* the property of the estates (J.A. 41), the Bank's explanation of the early regulations and of the cases that apply the statute to receivers and assignees (Bank Br. 33-34, 37-41) fit this trustee like a glove.[19]

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[18] The great bulk of the unreported and unpaid taxes here are those of the corporations; we understand that the Internal Revenue Agent preliminarily determined that taxes attributable to Gould's individual estate for the period in which the Miami Center was sold were approximately $2 million, including penalties and interest. In contrast, the Holywell corporate federal liabilities appear to exceed $21,600,000 prior to penalties and interest (*see* p. 7 n.9, *supra*; pp. 4a-7a *infra*) and the Florida and Virginia liabilities to exceed $6 million.

[19] The Bank's fall-back argument is that the word "assignee" *actually* means "assignee for the benefit of creditors under State common law." Bank Br. 41-42. It is strange, then, that Congress said "assignee, by order of a court of competent jurisdiction, by operation of law, or otherwise"; language that is hardly so limited. The trustee, who took title to all of the debtors' estates' property, fits easily within the ordinary meaning of the term "assignee." Moreover, the expansive language following "assignee" clinches the matter: a common law assignment for the benefit of creditors is a private arrangement, rather than one that takes effect by court order

Respondents urge a litmus test found nowhere in the statute. The test, they assert, is not whether Smith has "possession of all or substantially all the *property or business* of the debtors." Instead, they assert that the statute requires that he have "complete control" over the corporate shells by virtue of displacing their management, not just that he has taken over all the corporate assets. Smith Br. 25; Bank Br. 10, 41. This misreading of the statute flows from a mistaken application of *North American Oil Consolidated* v. *Burnet*, 286 U.S. 417 (1932). The issue in *North American Oil* was not whether a liquidator had to "displace" management in order to be held liable to pay federal taxes, but whether he was in charge of the "*entire* property or business." 286 U.S. at 423 (emphasis added). The receiver in *North American Oil* controlled but one of the "many properties operated by [the company]," 286 U.S. at 420, and therefore was held not within the ambit of the statute.[20]

Again and again, Smith has succeeded in asserting that he owns all the assets of the debtors' estates. *See* pp. 3-6, *supra*. It is axiomatic that "[f]or federal income tax purposes, gain or loss from the sale or use of property is attributable to the owner of the property." *Commissioner* v. *Bollinger*, 485 U.S. 340, 344 (1988);

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or by operation of law, *see Brashear* v. *West*, 32 U.S. (7 Pet.) 608, 614 (1983), yet the statute mentions those two examples first.

[20] Smith's fall-back position, that the corporations must have been "formally dissol[ved]" (Smith Br. 29) exalts form over substance in a way neither suggested by the statute nor countenanced by the cases, as he must acknowledge in calling *Louisville Property Co.* v. *Commissioner*, 140 F.2d 547 (6th Cir.), *cert. denied* 322 U.S. 755 (1944), "an exception that proves the rule." Smith Br. 29 n.27. In truth, *Louisville Property* is indistinguishable from this case—the *Louisville Property* fiduciary was an "assignee" of all of the property of the corporation, "which was not dissolved." 140 F.2d at 548. *Louisville Property* belies Respondents' attempt to classify and categorize every court of appeals case in order to argue that this liquidation is unlike any that any other court has ever addressed. Those cases have consistently applied section 6012(b)(3), no matter how the fiduciary was appointed or came into possession of the corporation's assets.

accord Blair v. *Commissioner*, 300 U.S. 5, 12 (1937). This fundamental principle is given effect in section 6012(b)(3), which provides that Smith, having possession of and title to all the assets of the debtors' estates, must pay the taxes. In sum, the plain words of section 6012(b)(3) compel the trustee to file Holywell's returns because he has "possession of" and "title to" *all* of Holywell's assets and its then-business—liquidation activities.

3. *Gould's Individual Estate and Section 6012(b)(4)*—Section 6012(b)(4) requires the finduciary of an "estate, a trust, or an estate of an individual under chapter 7 or 11," to make the appropriate return. Respondents' attempt to escape application of this statutory provision rests on a wooden reading of the words "estate" and "trust." They assert that "estate" means only a "decedent's estate," and "trust" means only a "taxable trust under subchapter J of the Internal Revenue Code." *See* Smith Br. 21 n.18; Bank Br. 25. But there is no reason to give this statute such a narrow reading. The courts have recognized the existence of an equitable "estate" or constructive "trust" in situations like this one, where a fiduciary takes possession of the assets of an individual or corporation.[21]

Respondents erroneously suggest that in all cases only one return will be filed in regard to the income in respect of assets and transactions of an individual. While obviously only a single return will be filed in the case of a decedent's "estate" or that of an adjudicated incompetent, other situations arise where the income in respect of

[21] *See, e.g., Williams* v. *Commissioner*, 44 T.C. 673, 676 (1965) (assignee for the benefit of creditors under court supervision is treated as the "receiver" of an "estate" and is a "trustee for all the creditors"); *Mickelson* v. *Barnet*, 460 N.E.2d 566, 570-71 (Mass. 1984) (effect of transfer for benefit of specified creditors was to convey assets in trust); *In re Mader's Store for Men, Inc.* 254 N.W.2d 171, 177 (Wis. 1977) ("estate" created by assignment for benefit of creditors); *see also* 6A C.J.S. *Assignments for Benefit of Creditors* § 72 (1975) ("[t]he creditors are the beneficiaries of a trust created by the assignment"); *id.* § 89 (assignee for the benefit of creditors has "the duty to manage, protect and conserve the estate for the benefit of both the assignor and the creditors").

assets and transactions of an individual who has been stripped of his assets may, in effect, be the subject of two returns; one to be filed by the fiduciary who acquired control of his assets and the other, by the individual himself, in respect of any economic activity he engages in after the divestment of his assets. The provision of section 6012(b)(4) requiring a return for "an estate of an individual under chapter 7 or 11 of title 11" to be filed by the fiduciary is the most obvious example, and it is common ground that both this "estate," for its transactions, and the individual himself are to file returns. To assume that it is the only case of this sort is unwarranted. The same section requires returns for an "estate" or a "trust" by their fiduciary. Certainly an "estate" or "trust" derived wholly from the assets of the "estate of an individual under chapter 7 or 11 of title 11" would logically, as well as linguistically, be treated the same as such a bankruptcy estate.

While the Respondents deny that this case is covered by the reference to "an estate of an individual under chapter 7 or 11 of title 11" in section 6012(b)(4), the United States has answered that argument (U.S. Br. 33-36), and we do not disagree with the United States. But if we are to take the Respondents at their word, and say that the trustee is no longer administering "an estate of an individual under . . . title 11," it would still be the case that he was fiduciary of a "trust," albeit one wholly derived from an estate under title 11, or was administering an "estate" so derived; and "trusts" and "estates" are likewise covered by section 6012(b)(4).[22] This subsection of the statute is thus consistent with the requirement of separate returns from (1) the fiduciary upon whom all of the individual's property has devolved, and

[22] That the liquidating trustee is holding an "estate of Gould" has been recognized in this case; the District Court ordered that the repayment of certain loans made by Gould and Holywell be made "to the *estates* of Gould and Holywell." *Bank of N.Y.* v. *Holywell Corp.*, No. 87-0970-Civ-Kehoe, slip op. at 11 (S.D. Fla. Nov. 4, 1989).

(2) the individual himself, as to his ongoing activities after being stripped of his assets.

Respondents try to construct an argument from a concession by the petitioners that the liquidating trust was not *itself* a separate taxable entity. Bank Br. 26; Smith Br. 19 n.14; *see* J.A. 121. Clearly the liquidating trust could not be a separate taxable entity, because the liquidating trustee was at the same time serving as assignee of a number of corporations as well as the fiduciary of an estate or trust derived from Gould's individual estate in the bankruptcy case; the only question among the parties is who was responsible for filing the returns of these corporations and that estate or trust, and paying the taxes for them. A trustee administering various estates is, of course, required to keep separate accounts and may not use the assets of one to pay the taxes of another. *See Palmer* v. *Webster & Atlas Nat'l Bank*, 312 U.S. 156, 163-67 (1941).

It is a *non sequitur* to argue, as do the Respondents, that the petitioners' admission that the liquidating trust itself was not a taxable entity means that it was a "grantor trust." The grantor trust rules simply have nothing to do with section 6012(b). In fact, application of the grantor trust rules in this case would lead to a *reductio ad absurdum.* Respondents suggest that Gould himself be treated as the "owner" of the trust in respect of his bankruptcy estate. But of course Gould, the individual, did not contribute anything to the trust—the trust was funded by Gould's *bankruptcy estate*, a separate taxable entity. The *bankruptcy estate*, not Gould himself, would be treated as the trust's 'owner," under Respondents' theory. For that reason, *Collier* rejects the application of the grantor trust rules to bankruptcy cases. 1 *Collier on Bankruptcy* ¶ 8.02 at 8-16 (Lawrence P. King, *et al.*, eds., 15th ed. 1991).[23]

[23] In addition, Respondents fail to come to grips with the Ninth Circuit's holding that the grantor trust rules simply are not to be applied in the bankruptcy context because there has not been a "voluntary" transfer for the benefit of the transferor. *DePinto* v. *United States*, 585 F.2d 405, 407 (9th Cir. 1978) ("the very nature of the Bankruptcy Act is inconsistent with the requirements of the Grantor Trust provisions"). Here, the trust was not created by Gould's voluntary act but by order of a court over his strenuous objection. Every case cited by the Bank (Bank Br. 27) involved a *voluntary* transfer initiated by the transferor, including *Vreeland* v. *Commissioner*, 16 T.C. 1041, 1048 n.3 (1951). The comment in *Vreeland* that the same result would apply to an involuntary transfer is only *dicta* unnecessary to the holding and inconsistent with *DePinto*.

4. *The Absolute Priority Statute*—In Smith's effort to escape absolute personal liability for making distributions of tens of millions of dollars in disregard of the priority of the United States, it is necessary for him to claim that a single word appearing in interrelated statutes means different things and that Congress intended to create a gap between the two priority statutes—31 U.S.C. § 3713 and 11 U.S.C. § 507—without leaving a hint of its intention to do so in the statutory text or the legislative history. Section 3713 of title 31 contains two subsections. Subsection (a) affords claims of the government a first priority, except in "a case under title 11." Subsection (b) ensures enforcement of the government's priority by providing for absolute, personal liability for "[a] representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government."

The obligations of the trustee under section 3713 interlock with Internal Revenue Code section 6012(b)(3). If Smith is held to be "a trustee in a case under title 11," *id.*, then section 3713 is inapplicable. But if Respondents are correct that Smith is *not* a "trustee in a case under title 11," then section 3713 provides the government with a first priority and imposes absolute, personal liability on Smith. In short, Smith cannot have it both ways.

a. Respondents' contention that the United States is entitled to no priority at all for the taxes incurred when

Smith sold the Miami Center and invested the proceeds in interest-bearing accounts is sheer sophistry. They do not deny that Congress modified section 3713 to ensure that the priorities set out in section 507 of the Bankruptcy Code would be applicable in all bankruptcy cases. *See* Holywell Br. 31-32. Instead, they contend that these ordinary priorities were eliminated by a stroke of the pen —they were not incurred by a regular "trustee" but by a "contract trustee." Smith Br. 11 n.11, 38. Thus Respondents claim to have found a gap: these taxes are entitled to neither the Bankruptcy Code's section 507 administrative priority nor section 3713(a)'s first priority.

The legislative history shows an interlock, not a gap. Congress used the same words (case under title 11) in the Bankruptcy Code and the Internal Revenue Code to *include* situations within the scope of section 507's priorities (*see* 11 U.S.C. § 103(a)) that it used to *exclude* those situations in section 3713. The purpose of the 1978 revision was to abandon the approach of the old Bankruptcy Act, whose priority section incorporated nonbankruptcy priorities. *See* former 11 U.S.C. § 104.a(5) (1976) (Old Act § 64.a(5)). Thus, the trustee is either one thing or the other. If he *is* a trustee in a case under title 11, he should have filed the tax returns at issue and paid the taxes in accordance with the ordinary statutory priority afforded taxes on the liquidation process by sections 503 and 507 (and this Court should say so to prevent further attempts at evasion on remand). That is the basic position the United States takes, and it is well supported. However, the Court need not reach that conclusion to reverse the judgment below. Consistent with the long-standing interpretive tradition surrounding the Absolute Priority Statute (*see* Holywell Br. 22) the Court may take Smith at his word and hold that he is not a "trustee in a case under title 11." That would result in holding Smith personally liable for having paid private claims ahead of the taxes.

b. In attempting to escape the personal liability provision of section 3713(b), Respondents are in a quandary,

for they asserted that Smith is not a "trustee in a case under title 11." They therefore cannot and do not argue that the exception in the personal liability section, subsection (b), for a "trustee acting under title 11," covers Smith. Instead, they argue that the *entire* statute is inapplicable, stating that this *case* is a "case under title 11," that section 3713 *as a whole* does not apply in "a case under title 11," (citing, but not quoting, section 3713(a)(2)), and therefore that the personal liability provision in subsection (b) is inapplicable as well. Smith Br. 35-36; Bank Br. 42-43. Even assuming, *arguendo*, that subsection (a) is inapplicable, Respondents' logic is flawed. Section 3713(a)(2) states, in its entirety, "This *subsection* does not apply to a case under title 11." (Emphasis added.) Subsection (b), then, *does* apply in "a case under title 11," except to "a trustee acting under title 11." If we take Respondents at their word, Smith is *not* such a "trustee": they say that phrase is a "term of art" (meaning an administrative-phase trustee) and is "used consistently in titles 26, 28, and 31" as well as title 11. Smith Br. 26-27, 38; Bank Br. 29-33 & n.31.

Smith also asserts that bankruptcy court approval for his actions insulates him from personal liability. Smith Br. 42 n.36. Of course, *King* v. *United States*, 379 U.S. 329, 338-40 (1964), establishes that "court instruction and approval" does *not* insulate the trustee from liability under section 3713(b).[24] As this Court observed in *Mosser* v. *Darrow*, 341 U.S. 267, 274 (1951), "a trusteeship is serious business and is not to be undertaken lightly or so discharged. The most effective sanction for good administration is personal liability for the consequences of forbidden acts."

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[24] Smith's reliance (Smith Br. 34 n.31) on I.R.C. § 6151 is also beside the point. It simply says that a fiduciary does not have to pay an estate's income taxes out of her own purse. It does not *insulate* Smith from liability imposed by statute or common law (*see* Holywell Br. 33 n.38) if he has wrongfully paid out money that should have been paid to the United States.

CONCLUSION

Because of the scheme at issue here, the federal and state governments have been deprived of their revenues in violation of the statutes. A construction of the statutes providing sanctions for the offenses against the federal fisc—based on the alternative arguments which we make—should be followed. If the trustee is held to be both a "trustee in a case under title 11" under section 6012(b)(3) and the analogous language in (b)(4) *and* also within the broader language in those sections—"assignee," "trust," etc., he should be estopped from claiming the exception in § 3713(b) for "trustees acting under title 11." This affords some prospect of enforcing the indemnity agreement and collecting the federal taxes from the real party in interest, the Bank.

Respectfully submitted,

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October 1991

APPENDICES

APPENDIX A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-ACB
84-01504-BKC-TCB

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Debtors.

ORDER APPOINTING TRUSTEE

[Bankr. C.P. No. 916; Trial Ex. 7]

On August 8, 1985 the Court entered an order confirming the Amended Consolidated Plan of Reorganization proposed by The Bank of New York (the "Bank's Plan"). Article V of the Plan contemplates the establishment of a liquidating trust and the appointment of a Trustee for all property of the debtors.

The Bank of New York has nominated Fred Stanton Smith to serve as Trustee under the Bank's Plan. In accordance with the discussions among counsel in open Court on August 8, Mr. Smith has been introduced to counsel for the debtors and Olympia & York.

In the interest of assuring an orderly transition from the debtors-in-possession to the Trustee, it is hereby ORDERED that:

1. Fred Stanton Smith is hereby appointed as Trustee for purposes of the Bank's Plan.

2. Since motions for rehearing are anticipated and will not be heard until next month, for the time being:

(a) the Trustee's compensation and expenses shall be borne by the Bank;

(b) The Trustee shall not assume title to, and possession and control of the debtors' property and affairs as contemplated by the Bank's Plan until such time, if any, as the motions for rehearing on the confirmation order have been heard and determined; in the interim, the Trustee and his representatives shall have the power and right:

(1) Upon notice to the debtors-in-possession, to enter upon and inspect the debtors' premises in order to become familiar with debtors' operations, including, without limitation, the Miami Center buildings and operations;

(2) Review and copy all books and records of the debtors and their respective subsidiaries, including all records, relating to receipts and disbursements, all bank statements, checkbooks, ledgers, and other financial data;

(3) Discuss the affairs and business operations of the debtors and their respective subsidiaries with the officers, directors, employees, attorneys, accountants, agents, tenants, subtenants, of such entities in order to gain a thorough understanding of such affairs and operations; and

(4) Engage attorneys, accountants, and such further consultants as he may deem appropriate, providing notice of such retention to parties in interest, for the purpose of analyzing the legal rights and financial position of the debtors and their respective subsidiaries.

3. On or before the date the Trustee assumes possession and control of the debtors' property and affairs pursuant to the Plan, the Trustee shall:

(a) File with the Court and serve upon all parties in interest a written statement describing the proposed basis for his compensation as Trustee and the identity of, and proposed compensation for, such attorneys, accountants, and consultants as have been retained by him. No compensation shall be payable to the Trustee or to any such attorney, accountant, or consultant from the assets of the debtors' estates until the Court has reviewed and heard any objections to such proposed compensation arrangements.

(b) Post a Trustee's bond in the amount of $1,000,000.00 in form approved by the Court. All payments of claims by the Trustee shall be approved by Court order.

DONE AND ORDERED at Miami, Florida, this 12 day of August, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

cc: Counsel and Parties per
Attached Service List

APPENDIX B

SUMMARY SHEET (FIRST SHEET) OF REVENUE AGENT'S REPORT ON HOLYWELL CORPORATION AND CONSOLIDATED SUBSIDIARIES

[NOTES: (1) The Revenue Agent's Report as delivered to Respondent Smith and to Holywell is marked "*DRAFT*" and is not executed by the examiner. We understand that this has been done to avoid starting the 30-day period provided by Internal Revenue Service to initiate an administrative appeal, pending the Court's decision in this case.

(2) The computation of taxes on the Report does not include interest. With interest through October 1, 1991, the total liability for the consolidated group is approximately $32.3 million for the taxable year ending July 31, 1986, and approximately $2.8 million for the taxable years ending July 31, 1987 through July 31, 1991. Any applicable penalties and interest on them are likewise not included.]

Form 4549
Rev 7/81

Return Form No.
1120

DEPARTMENT OF THE TREASURY—INTERNAL REVENUE SERVICE
INCOME TAX EXAMINATION CHANGES

Name and Address of Taxpayers
HOLYWELL CORPORATION & SUSIDIARIES
2564-B IVY ROAD
CHARLOTTESVILLE, VIRGINIA 22901

S.S. or E.I.N.
52-1070235

Filing Status
CORPORATION

Person With Union Changes Were Discussed

1. Adjustments to Income:	Year 07/31/86	Year 07/31/87	Year 07/31/88	Year 07/31/89	Year 07/31/90	Year 07/31/91
A. Taxable Income Before Net Operating Loss Deduction	60,499,881.00	459,299.00	930,237.00	914,183.00	1,959,691.00	3,019,226.00
B. Net Operating Loss Deduction	(14,270,398.00)					
C.						
D.						
E.						
2. Total Adjustments	46,229,483.00	459,299.00	930,237.00	914,183.00	1,959,691.00	3,019,226.00
3. Taxable Income Per Return	0.00	0.00	0.00	0.00	0.00	0.00
4. Corrected Taxable Income	46,229,483.00	459,299.00	930,237.00	914,183.00	1,959,691.00	3,019,226.00
5. Tax (From Page 2)	18,435,313.00	188,067.00	316,281.00	310,822.00	666,295.00	1,014,787.00

	Year 07/31/86	Year 07/31/87	Year 07/31/88	Year 07/31/89	Year 07/31/90	Year 07/31/91
6. Alternative Tax, If Applicable (from Page —)						
7. Corrected Tax Liability	18,435,313.00	188,067.00	316,281.00	310,822.00	666,295.00	1,014,787.00
8. Less: Credits:						
A. Investment Tax Credit (Page 2)	987,667.00					
B. Jobs Credit (from Page —)						
C.						
9. Balance	17,447,646.00	188,067.00	316,281.00	310,822.00	666,295.00	1,014,787.00
10. Plus:						
A. Tax From Recomputing Prior Year ITC	529,286.00					
B. Self-Employment Tax						
C. Minimum Tax (From Page 2)	1,168,006.00					
11. Total Corrected Tax Liability	19,144,938.00	188,067.00	316,281.00	310,822.00	666,295.00	1,014,787.00
12. Total Tax as Previously Adj	0.00	0.00	0.00	0.00	0.00	0.00
13. Deficiency (line 12-line 13)	19,144,938.00	188,067.00	316,281.00	310,822.00	666,295.00	1,014,787.00
14. Overassessment (line 13-line 12)						

15. Adjustment to Prepayment Credits						
16. Balance Due, Not including interest	19,144,938.00	188,067.00	316,281.00	310,822.00	666,295.00	1,014,787.00
17. Overpayment, Not including interest						
18. Penalties, If Any (see explanation)						

Other Information

Refer to pages 12 through 24 for a comprehensive statement of the facts of this case.

Examiner's Signature

Nos. 90-1361, 90-1484

In The

Supreme Court of the United States

October Term, 1991

HOLYWELL CORPORATION, *et al.*,

Petitioners,

v.

FRED STANTON SMITH, *et al.*,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

FRED STANTON SMITH, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF CALIFORNIA, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH DAKOTA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WEST VIRGINIA AND THE CITY OF NEW YORK AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Nos. 90-1361, 90-1484

In The

Supreme Court of the United States

October Term, 1991

HOLYWELL CORPORATION, *et al.*,

Petitioners,

v.

FRED STANTON SMITH, *et al.*,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

v.

FRED STANTON SMITH, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF CALIFORNIA, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH DAKOTA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WEST VIRGINIA AND THE CITY OF NEW YORK AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTRODUCTORY STATEMENT

Pursuant to United States Supreme Court Rule 37.2, the signatory States, the District of Columbia and the City of New York submit this Brief as Amici Curiae supporting Petitioners to apprise the Court of significant non-federal governmental interests implicated by the decision of the United States Court of Appeals for the Eleventh Circuit ("court of appeals") in this case. Because this Brief is sponsored and filed by the aforementioned governments, consent to its filing is not required. U.S. Sup. Ct. R. 37.5.

INTEREST OF THE AMICI CURIAE

The States, as sovereigns that must function effectively in our federal system, have a vital interest in the collection of taxes in the bankruptcy process. No non-federal officer or agency is a party to this case because the trustee (Fred Stanton Smith) failed to include any as parties to his declaratory judgment action against the United States and the debtors.[1] The court of appeals' decision in the case sanctions a new tax-avoidance device that could adversely affect States' ability to collect taxes in bankruptcy cases. Instead of a regular "trustee" subject to all state and local taxes (*California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 853 (1989)), bankruptcy participants can now agree on a standard-form "reorganization plan" calling for a "liquidating trustee" to liquidate the bankruptcy estate and thereby avoid all state and local (as well as federal) taxes incurred during the liquidation process.

The taxing power is "one of the primary indicia of sovereignty," *Illinois v. Kentucky*, 111 S.Ct. 1877, 1882 (1991), and this Court "has recognized repeatedly that state sovereignty is a fundamental component of our system of government." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 573 (1985) (Powell, J. dissenting). Indeed, as this Court stated more than a century ago, "[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective

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[1] As a result, the court of appeals focused exclusively on the federal income tax issue. However, the trustee has not paid state income taxes either, and an affirmance by the Court will threaten the public fisc of the States, as well as the federal government. A trustee who considers himself free of the obligation to pay federal income taxes cannot be expected to honor his obligations to pay state income taxes. In the case of Holywell Corporation, the Virginia Department of Taxation in March 1988 conducted a field audit for the fiscal year ending July 31, 1986, during which Miami Center was sold, and assessed corporate income tax, penalties, and interest totaling

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over $1.3 million. The trustee, through his attorney, Mr. Herbert Stettin, has refused to pay the assessment.

For the fiscal year ending July 31, 1985, the debtor Holywell Corporation through its President Theodore B. Gould in February 1988 filed a Virginia state income tax return reporting capital gains from the preconfirmation sale of properties in the Washington, D.C. area, with a letter demanding payment of the tax liability from the Miami Center Liquidating Trust. The Virginia Department of Taxation made certain adjustments to the return as filed and in March 1988 assessed corporate income tax, penalty and interest totaling $147,418. The trustee has also refused to pay this assessment.

governments." *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871). It is, therefore, "the imperative duty of the court to recognize as paramount, and enforce with promptness and vigor, the just claims of the authorities for the prescribed contributions to state and municipal revenue. . . . The courts of the United States have always recognized the importance of leaving the powers of the State[s] in respect to taxation unimpaired." *In re Tyler*, 149 U.S. 164, 187 (1893).

The signatory Amici believe that the court of appeals' decision overlooks an important federal statute, 28 U.S.C. § 960, that clearly requires all fiduciaries acting under the authority of a federal court, including the so-called "contract trustee" in this case, to report and pay applicable state and local taxes incurred in the liquidation process. This statute provides:

> Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

28 U.S.C. § 960.[2]

[2] The plain language of 28 U.S.C. § 960, which applies to "*[a]ny* officers and agents conducting *any* business under authority of a United States court" (emphasis added), is broader than § 6012(b)(3) of the Internal Revenue Code (26 U.S.C.), which applies to "a receiver, trustee in a case under title 11 of the United States Code, or assignee" having possession of or title to all or substantially all of a corporation's

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SUMMARY OF ARGUMENT

The decision below creates a dangerous loophole that—if sustained—could enable private creditors to avoid state and local as well as federal taxes through a technicality that violates the plain meaning and purpose of 28 U.S.C. § 960, as well as the structure of the Bankruptcy Code and parallel state statutes. The court of appeals ruled that a trustee of a trust created to liquidate a corporation's assets as part of a Chapter 11 bankruptcy reorganization plan need not report and pay federal (and thus by implication state) income taxes on either capital gains resulting from the liquidation process or income earned by the trust. In this case, the trustee's failure to file returns or pay state income taxes has created a liability to the Commonwealth of Virginia exceeding one million dollars.

Although the court of appeals did not address it, a federal statute (28 U.S.C. § 960) quite clearly requires the payment of state as well as federal and local taxes, as this Court has confirmed on several occasions. The court of appeals' failure to acknowledge the applicability of § 960 could by implication negate the trustee's obligation to report and pay state taxes, regardless of the provisions of state law.

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property. The signatory Amici maintain that § 960, which was cited to the court of appeals by the debtors, requires the trustee in this case to pay applicable state and local taxes regardless of whether the court of appeals was correct in its interpretation of § 6012(b)(3) of the Internal Revenue Code.

In adopting § 960, Congress meant to preserve States' ability to collect taxes, an essential attribute of sovereignty vital to States' ability to function effectively within our federal system. This Court recently examined the language, legislative history and jurisprudence of § 960 and concluded that the statute requires any officer or agent appointed by a United States court, including a bankruptcy trustee, to pay state taxes "on the liquidation process." *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 853 (1989). The Court added, " 'Congress has, in the interest of justice or good will, by this Act directed the trustee to pay rather than litigate these tax claims. By the sweeping terms of this statute all doubts have been resolved in favor of the state taxes.' " 490 U.S. at 852-53 n.9 (quoting *Thompson v. Louisiana*, 98 F.2d 108, 111 (8th Cir. 1938)). Other decisions have recognized the "plain language" Congress used to require a broad spectrum of court officers to pay state and local taxes.

A trustee's duties under § 960 to report and pay state and local taxes affirm duties imposed by the Bankruptcy Code and parallel state statutes. The Bankruptcy Code ordinarily requires the trustee (or debtor-in-possession) to file state and local tax returns and to pay applicable state and local taxes. 11 U.S.C. §§ 346(c)(2), 728(b), 1146(b). In addition, state and local taxes incurred on sales during the course of the bankruptcy are treated as administrative expenses. 11 U.S.C. §§ 503(b)(1)(B)(i), 507(a)(1). Parallel state statutes also require trustees of bankrupt corporations to report and pay state taxes, an obligation Congress expressly recognized and preserved in enacting 28 U.S.C. § 960.

The court of appeals' decision imposes an undue administrative burden on state and local governments. Because corporations and other business organizations often operate in multiple jurisdictions, many bankruptcy cases result in tax liabilities to numerous States and localities. These States and localities are unlikely to be listed on the debtor's schedule of liabilities or to have any notice of a potential threat to their revenues. That is particularly true when, as here, taxes are incurred *after* the plan has been confirmed.

State and local governments cannot realistically be expected to track every bankruptcy case in every federal district in the nation to watch for the establishment of liquidating trusts and the confirmation of reorganization plans that fail to provide for payment of state and local taxes incurred after confirmation. In enacting 28 U.S.C. § 960, Congress chose to require all federally appointed fiduciaries acting under the authority of United States courts, including the bankruptcy courts, to assume the obligation of voluntarily reporting and paying applicable state and local taxes.

ARGUMENT

I. Introduction

The bankruptcy court in this case approved a liquidation of the debtors' assets. Rather than use the ordinary bankruptcy process of Chapter 7 liquidation or have a bankruptcy trustee or the debtors-in-possession liquidate in the Chapter 11 proceeding, however, the court agreed with the debtors' major creditor (the Bank of New York)

that a "liquidating trust" should be created as part of a "plan of reorganization." The court of appeals held, in a split decision, that the trustee of this liquidating trust was not required to report and pay federal (and thus by implication state) income taxes on capital gains and interest realized through the liquidation process, because he was "not a trustee under Title 11, but rather a contract trustee performing essentially limited and ministerial duties." Pet. App. 11a; 911 F.2d at 1545.[3] Instead, the debtors—whose assets were transferred to the trustee's control as part of the Bank's "reorganization" plan—are apparently supposed to pay the taxes. In the case of the Holywell Corporation (which had the bulk of the tax liability), this cynically leaves a corporate shell with no assets—and the state and federal treasuries—holding the bag.[4] Such a result contravenes the Bankruptcy Code's basic goal of providing the reorganized debtor a fresh start through payments made in accordance with an orderly statutory scheme establishing the rights and priorities of competing creditors, including federal, state and local tax collectors. *See* 11 U.S.C. § 506 (rights of secured creditors); 11 U.S.C. § 507 (schedule of priorities among unsecured creditors).

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[3] As the Solicitor General has observed, the term "contract trustee" appears to have no basis in federal jurisprudence.

[4] As noted, for the fiscal year ending July 31, 1985, the debtor Holywell Corporation filed a Virginia state income tax return reporting gains from the preconfirmation sale of the Washington properties, but has made no payment of the outstanding state tax liability for that year. For the fiscal year ending July 31, 1986, there has been neither a state income tax

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The signatory Amici request this Court to reverse the court of appeals' decision for three reasons. First, it ignores § 960 of the Judicial Code, through which Congress chose to protect an essential building block of federalism by requiring any fiduciary acting under the authority of a federal court to comply with state and local tax laws. Second, the court of appeals' decision is inconsistent with the structure of the Bankruptcy Code and parallel state statutes. Finally, it imposes an undue administrative burden on state and local government officials to monitor and enforce trustees' compliance with state and local tax laws on a nationwide basis.

II. 28 U.S.C. § 960 Is a Clear Congressional Mandate Requiring All Federally Appointed Fiduciaries to Report and Pay Federal, State and Local Taxes

The court of appeals clearly overlooked § 960 of the Judicial Code. This statute plainly requires any fiduciary acting under the authority of a federal court, including this trustee, to file returns and pay applicable federal, state and local taxes:

> Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the

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return, nor any payment. State law has likewise been ignored with respect to continuing postconfirmation earnings.

same extent as if it were conducted by an individual or corporation.

28 U.S.C. § 960. The statute subjects the trustee's business activities to state and local (as well as federal) taxes "to the same extent" as if they were conducted by an individual or corporation. The "plain meaning" of the phrase "conducting any business" includes liquidating a business or the estate of an entity conducting a business. *See California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851 (1989).

Section 960 is a specific articulation of a federally appointed fiduciary's general statutory obligation under 28 U.S.C. § 959(b) to manage and operate the debtor's property according to applicable state law requirements. *See Kansas City v. Johnson*, 70 F.2d 360 (8th Cir.), *cert. denied*, 293 U.S. 617 (1934) (federal receiver not exempt from state and local taxes under predecessor statute).[5]

As Chief Justice Rehnquist has stated, § 960 is "plain on its face" and embodies Congress' "express mandate" that the payment of state taxes is "[t]he paramount federal interest" to which federal courts must defer in bankruptcy cases. *New Jersey v. Reading Co.*, 451 U.S. 918, 918-20 (1981) (Rehnquist, J., dissenting from denial of certiorari). This "express mandate" reflects Congress' choice to promote our system of federalism—a "unique

[5] Present § 959 is based on former 28 U.S.C. §§ 124 and 125 as enacted by Act of March 3, 1911, ch. 231, §§ 65, 66, 36 Stat. 1087, 1104-05, which preceded the 1934 enactment of a specific rule for taxes in § 960. *See* Act of June 18, 1934, ch. 585, 48 Stat. 993.

feature of the United States . . . guaranteed by the Constitution and implicit in the very name of our country." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 560 (1985) (Powell, J., dissenting).[6]

The court of appeals' failure to acknowledge the clear applicability of 28 U.S.C. § 960 also impliedly negates parallel state statutes explicitly requiring trustees of corporations in bankruptcy to file returns reporting income arising out of the liquidation process.[7] Such implied

[6] *Accord Gregory v. Ashcroft*, 59 U.S.L.W. 4714, 4716 (U.S. Sup. Ct. June 20, 1991) (" 'the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.' " (quoting *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869)).

[7] *See, e.g.*, Va. Code Ann. § 58.1-441 (1991), which provides in pertinent part:

> Receivers, trustees in dissolution, trustees in bankruptcy, and assignees, operating the property or business of corporations must make returns of income for such corporations. If a receiver has full custody of and control over the business or property of a corporation, he shall be deemed to be operating such business or property, whether he is engaged in carrying on the business for which the corporation was organized or only in marshaling, selling, or disposing of its assets for purposes of liquidation.

See also, e.g., Cal. Rev. & Tax Code §§ 6005, 6019 (1987) (sales and use tax) 17004, 17006, 17007 (1983) (personal income tax), 23038, 23039, 25403 (1979 & Supp. 1991) (bank and corporation tax); D.C. Code Ann. § 47-1808.1 (1990); Fla. Stat. Ann. §§ 214.52, 220.11 (West 1989); 1991 Haw. Sess. Laws, Act 23 (amending Haw. Rev. Stat. § 237-1 (1985)); Ind. Code Ann. § 6-2.1-5-7 (Burns 1989); Kan. Stat. Ann. § 79-3220(b) (1989); La. Rev. Stat. Ann. § 47:2102 (West 1990); Md. Tax—Gen. Code

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preemption of state law requirements cannot be sustained in light of Congress' plainly expressed intent in 28 U.S.C. § 960 to protect States' sovereign power of taxation by requiring fiduciaries acting under the authority of a federal court to comply with state law requirements.

As noted previously, the power to lay and collect taxes is a fundamental attribute of state sovereignty, a power critical to States' ability to function effectively in our federal system. The plain language of the federal statute requires any federally appointed fiduciary to consult and comply with applicable state and local tax laws.[8]

This Court's decisions confirm that the plain language of 28 U.S.C. § 960 applies generally to taxation of all activities of all officers operating businesses under federal court authority, without exception. The Court first applied the statute in 1939. Writing for a unanimous Court, Justice Black—who, as a member of the Senate,

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Ann. §§ 10-804, 1-101(p) (1988); Minn. Stat. Ann. § 289A.08, Subd. 2 (Supp. 1991); Mo. Ann. Stat. §§ 143.481, 143.501 (Vernon 1976) (income tax), 144.010(5) & (9), 144.021 (Vernon Supp. 1991) (sales and use taxes); N.Y. City Admin. Code §§ 11-603(3) (1966), 11-1701 (1986); N.Y. Tax Law § 601(c) & (e) (McKinney 1987 & Supp. 1991); R.I. Gen. Laws § 44-11-36 (1988); Tenn. Admin. Comp. § 1320-5-1-.57 (1991); Tex. Tax Code Ann. §§ 151.008(b)(2), 151.052 (Vernon 1982 & Supp. 1991); Utah Code Ann. § 59-7-143 (1987).

[8] Under § 960, the state tax laws with which trustees must comply include income and sales and use taxes. Forty-four States and the District of Columbia impose a corporate income tax, forty-two States impose a tax on at least some forms of personal income, and Michigan imposes a "Single Business Tax" on corporations and individuals. Forty-four States impose sales and use taxes. *See* J. Hellerstein, *State Taxation: I Corporate Income & Franchise Taxes* ¶ 1.6, at 20-23 (1983).

was present when the Act was considered and passed in 1934[9]—recognized the statute's broad applicability:

> Congress has here with vigor and clarity declared that a trustee and other court appointees who operate businesses must do so subject to state taxes "the same as if such business[es] were conducted by an individual or corporation."
>
> * * *
>
> The Act of 1934 indicates a Congressional purpose to facilitate—not to obstruct—enforcement of state laws; the court below correctly recognized and applied this Congressional purpose . . . [by holding a bankruptcy trustee liable for California taxes and penalties for his failure to pay them].

Boteler v. Ingels, 308 U.S. 57, 61 (1939).

This Court recently considered at length the applicability of § 960 to trustees appointed by bankruptcy courts. *See California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989) ("*Sierra Summit*"). In *Sierra Summit*, the respondent relied on § 960 to argue that the imposition of California sales and use taxes on a bankruptcy liquidation sale impermissibly encroached on the federal bankruptcy process. The Court examined the statute and the bankruptcy laws and concluded that "[n]othing in the plain language of the statute, its legislative history, or the structure of the Bankruptcy Code indicates that Congress intended to exclude taxes on the liquidation process from those taxes the States may impose on the bankrupt estate." 490 U.S. at 853.

[9] 78 Cong. Rec. 11,466 (1934).

Section 960, of course, applies to all state and local taxes, including income taxes—as well as federal taxes. "Read most naturally, the statute evinces an intention that a State be permitted to tax a bankruptcy estate . . . and that, as a matter of federal law, 'a business in receivership, or conducted under court order, should be subject to the same tax liability as the owner would have been if in possession and operating the enterprise.' " *Sierra Summit*, 490 U.S. at 852 (quoting *Palmer v. Webster & Atlas Nat'l Bank of Boston*, 312 U.S. 156, 163 (1941)). As the *Sierra Summit* Court explained, " '[b]y the sweeping terms of this statute all doubts have been resolved in favor of the state taxes.' " 490 U.S. at 852-53 n.9 (quoting *Thompson v. Louisiana*, 98 F.2d 108, 111 (8th Cir. 1938)).

The legislative history also confirms Congress' sweeping intent—consistent with the structure of the Constitution and the federalism concept embodied in the Tenth Amendment—to preserve state tax collection authority in the bankruptcy liquidation context. Indeed, the committee reports reflect a congressional intent to supersede a federal district court ruling that under the common law, property in the hands of a receiver is not subject to tax.[10] "No good reason is perceived why a receiver should be permitted to operate under such an advantage as against his competitors not in receivership, and the States and local governments be deprived of this revenue." H.R. Rep. No. 1138, 73d Cong., 2d Sess. 1 (1934); S. Rep. No. 1372, 73d Cong., 2d Sess. 1 (1934).

[10] *Howe v. Atlantic, Pac. & Gulf Oil Co.*, 4 F. Supp. 162, 163-64 (W.D. Mo. 1933), *rev'd on state law grounds sub nom. Kansas City v. Johnson*, 70 F.2d 360, 361 (8th Cir.), *cert. denied*, 293 U.S. 617 (1934).

The bill was amended on the House floor without debate to apply not only to receivers but also to a "liquidator, referee, trustee, or other officer or agent." 78 Cong. Rec. 6,656 (1934). When Congress revised the Judicial Code in 1948, it deleted most of this enumeration as redundant, leaving only the present-day "any officers and agents" subject to state and local taxes. H.R. Rep. No. 308, 80th Cong., 1st Sess. 5, A102-03 (1948). *See also* W. Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws—Income Tax Liabilities of the Estate and the Debtor*, 72 Mich. L. Rev. 935, 940 (1974). Congress' clear intent was that the phrase "any officers and agents" encompass a broad range of court-appointed individuals, including—specifically—a "liquidator" or a "trustee."

There can be no doubt that the phrase "officer[ ] and agent[ ] conducting any business under authority of a United States court" fits this trustee like a glove. His authority to conduct liquidating processes with respect to the debtors' business was derived from the order of the bankruptcy court approving the Plan of Reorganization; he filed a fidelity bond in favor of the United States with the court; and the bankruptcy court retained jurisdiction "to make any orders which may be necessary or appropriate to carry out the provisions of [the] Plan" until the trustee had made all "payments and distributions called for under the Plan." Pet. App. 46a.

III. 28 U.S.C. § 960 Affirms Duties Imposed by The Bankruptcy Code and Applicable State Laws

The intent expressed in § 960 harmonizes with duties imposed on trustees by the Bankruptcy Code and applicable

state law. Various provisions of the Bankruptcy Code confirm Congress' intent that the trustee in a bankruptcy case assume the debtors' obligations to report and pay all accruing taxes, state, local and federal. *See* W. Plumb, 72 Mich. L. Rev., *supra*, at 940. Three separate sections of the Bankruptcy Code require the trustee to file the appropriate state and local tax returns for various types of debtors.[11] Section 505(b) of the Bankruptcy Code further provides the trustee a procedure (initiated by filing a return) for obtaining an expedited determination of any tax liability incurred during the administration of the estate. And it is the *estate*, not the emerging debtor, that is generally responsible for the payment of taxes incurred in the administration of the estate.[12] As the Senate Judiciary Committee explained,

[11] 11 U.S.C. § 346(c)(2) (trustee of corporation or partnership); 11 U.S.C. § 728(b) (trustee for individual or corporation in Chapter 7 where debtor has net taxable income for entire period following order for relief); 11 U.S.C. § 1146(b) (trustee of individual in Chapter 11). *See also* 11 U.S.C. § 346(f) (trustee shall withhold and pay over taxes according to applicable state or local tax law); 11 U.S.C. §§ 1106(a) and 704(8) (duties of trustee authorized to operate business include filing periodic reports with taxing authorities).

[12] *See* 11 U.S.C. § 346(b)(1) (income of individual's estate may be taxed by state and local authorities only to the estate, and not to such individual); 11 U.S.C. § 346(f) (trustee must pay state and local withholding taxes); 11 U.S.C. §§ 1129(a), 726(a)(1), 507(a)(1), 503(b)(1)(B)(i) (together, prohibiting a plan of reorganization from being confirmed if it would provide for payment of any unsecured claims before administrative expenses (*e.g.*, any tax "incurred by the estate"). The only exception is in the case of an individual under Chapter 13. *See* 11 U.S.C. § 346(d) (state and local income tax on individual in Chapter 13 may be imposed only on debtor, not estate).

administrative expenses generally "include taxes which the trustee incurs in administering the debtor's estate, including taxes on capital gains from sales of property by the trustee and taxes on income earned by the estate during the case." S. Rep. No. 989, 95th Cong., 2d Sess. 66, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5852.

The court of appeals swept away this entire structure, as well as applicable state law (*see supra* notes 7-8), through the simple expedient of a "contract trustee" immune from the responsibilities imposed on all other fiduciaries acting under the authority of a federal court. The signatory Amici respectfully submit that the structure of the Bankruptcy Code does not permit such an extraordinary result; instead—consistent with § 960—it requires the trustee (whether appointed before, upon or after confirmation) to pay the state and local taxes incurred as a result of the liquidation process.

IV. The "Contract Trustee" Device Sanctioned By the Court of Appeals Frustrates Congress' Intent to Facilitate State and Local Tax Collection

Section 960 and the structure of the Bankruptcy Code express Congress' intent that fiduciaries acting under the authority of a federal court assume responsibility for reporting and paying state and local taxes. The "contract trustee" device sustained by the court of appeals could seriously undermine compliance with applicable state and local tax laws.

Nearly all the States impose income, sales or use taxes applicable to bankruptcy liquidation activities. *See supra* note 8. Where, as here, capital gains result from liquidating sales, state income taxes applicable to the liquidation process will likely be due.

The court of appeals' decision ignores the practical realities of the situation. Like the federal system, state and local tax systems rely upon *voluntary* reporting and payment. When the trustee pays state taxes in the ordinary course and files state tax returns, bankruptcy does not interfere with the collection of state taxes incurred after the bankruptcy proceeding commences. Here, however, the trustee has taken the position that he is not responsible to file returns or pay these state taxes, based upon his supposedly unique status as a "contract trustee" of a trust created pursuant to a confirmed Chapter 11 plan of reorganization. Such an exemption would utterly frustrate Congress' intent to protect and facilitate the collection of state and local taxes applicable to the liquidation process.[13]

The court of appeals' decision imposes an undue administrative burden on state and local governments to monitor and enforce trustees' compliance with state and local tax laws on a nationwide basis. Many corporations and individuals conduct business in multiple jurisdictions. As businesses have become more interstate in character, with myriad activities nationwide, multistate taxpayers—both individual and corporate—are increasingly common. As a result, many bankruptcy cases result in tax liabilities to numerous States and localities. These States and localities are unlikely to be listed on the debtor's schedule of liabilities or to have any notice of a

[13] When Congress intends to exempt transactions arising out of bankruptcy from state and local taxes, it makes that intent explicit. *See* 11 U.S.C. § 1146(c) (stamp tax or similar tax shall not apply to transfers under a confirmed reorganization plan). *See also Sierra Summit*, 490 U.S. at 851-53 (congressional intent to create exemption from state taxation must be clearly expressed).

potential threat to their revenues. That is particularly true when, as here, taxes are incurred *after* the plan has been confirmed and the trustee refuses even to file a return.[14]

State and local governments cannot realistically be expected to track every bankruptcy case in every federal district in the nation to watch for the establishment of liquidating trusts and the confirmation of reorganization plans that fail to provide for payment of state and local taxes incurred after confirmation. State and local government attorneys, moreover, often encounter significant procedural obstacles to their participation in out-of-state bankruptcies in the form of local counsel requirements.[15]

[14] As noted, the bulk of the unpaid state tax liability in this case arises from the post-confirmation sale of the Miami Center property during the fiscal year ending July 31, 1986, for which no state tax return was filed.

[15] *See, e.g.*, U.S. Bankr. Ct. D. Alaska R. 1(B)(1); U.S. Bankr. Ct. E. & W.D. Ark. R. 2(d); U.S. Bankr. Ct. C.D. Cal. R. 102(2)(c); U.S. Bankr. Ct. D. Colo. R. 16; U.S. Bankr. Ct. S.D. Fla. R. 7 (incorporating U.S. Dist. Ct. S.D. Fla. R. 4); U.S. Bankr. Ct. M.D. Fla. R. 109(c)(1); U.S. Bankr. Ct. D. Del. Order No. 1(c) (incorporating U.S. Dist. Ct. D. Del. R. 8.1); U.S. Bankr. Ct. D. Haw. R. 720(4); U.S. Bankr. Ct. D. Idaho R. 106(d); U.S. Bankr. Ct. M.D. La. R. 104(c)-(e); U.S. Bankr. Ct. D. Md. R. 4(a); U.S. Bankr. Ct. D. Minn. R. 143(b) (local counsel required to file complaint and represent plaintiff in adversary proceeding); U.S. Bankr. Ct. D. N.M. R. 1-102(b); U.S. Bankr. Ct. D. Mont. R. 2 (adopting U.S. Dist. Ct. D. Mont. R. 110-2(c)); U.S. Bankr. Ct. S.D. N.Y. R. 4(a) (local address for service of papers required unless court orders otherwise); U.S. Bankr. Ct. W.D. N.C. Local Form 110-1 (court may approve representation without local

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The sheer enormity of the task of monitoring bankruptcy proceedings on a nationwide basis would be staggering. Calculating the taxes due without a return disclosing the debtor's property holdings and business activities would further complicate the task. State and local taxes on multistate business enterprises operating in more than one jurisdiction must be fairly apportioned to satisfy federal Due Process and Commerce Clause requirements. *See Trinova Corp. v. Michigan Dep't of Treasury,* 111 S. Ct. 818, 828 (1991) ("*Trinova*"). Forty-four States and the District of Columbia currently utilize apportionment formulas reflecting a business' in-state and out-of-state property, payroll and sales.[16] Returns disclosing the taxpayer's multistate business activities and property holdings, therefore, are a practical necessity.

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counsel); U.S. Bankr. Ct. S.D. Ohio R. 4.1 (local "case attorney" generally required); U.S. Bankr. Ct. E.D. Tenn. R. 1 (local counsel required for party in adversary proceeding); U.S. Bankr. Ct. D. Utah R. 1(c); U.S. Bankr. Ct. E.D. Va. R. 105(E)(2).

To explore these and other impediments to effective participation in out-of-state bankruptcy proceedings, the National Association of Attorneys General in March 1991 announced the creation of a Bankruptcy Information Exchange Network consisting of attorneys in thirty-six State Attorneys General Offices and the Republic of Guam working in the bankruptcy area. This group's efforts are still in a formative stage.

[16] *See generally Trinova,* 111 S. Ct. at 833; *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 170 (1983); J. Hellerstein, *State Taxation: I Corporate Income & Franchise Taxes,* ¶9.6, at 495 (1983).

Section 960 of the Judicial Code reflects Congress' choice that all bankruptcy trustees, including this one, must assume the obligation of voluntarily complying with applicable state and local tax laws. The court of appeals' contrary decision improperly shifts to States and localities the burden of policing trustees' compliance with these laws. Under 28 U.S.C. § 960, it is the trustee's obligation voluntarily to comply with the law.

CONCLUSION

At a time when state and local governments are struggling with fiscal crises, it is critical that their ability to collect taxes be preserved. The court of appeals' decision erroneously creates a heretofore unknown exception from federal and state filing requirements for a so-called "contract trustee." This significant tax loophole threatens to impair States' and local governments' ability to collect revenues to which they are lawfully entitled. The power to tax, an essential attribute of state sovereignty vital to States' ability to function effectively as part of our federal system, and jealously guarded by Congress and this Court, is at stake. Section 960 of the Judicial Code through which Congress intended to protect States' sovereign power of taxation requires reversal of the court of appeals' decision.

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